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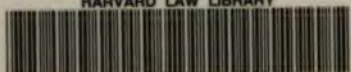
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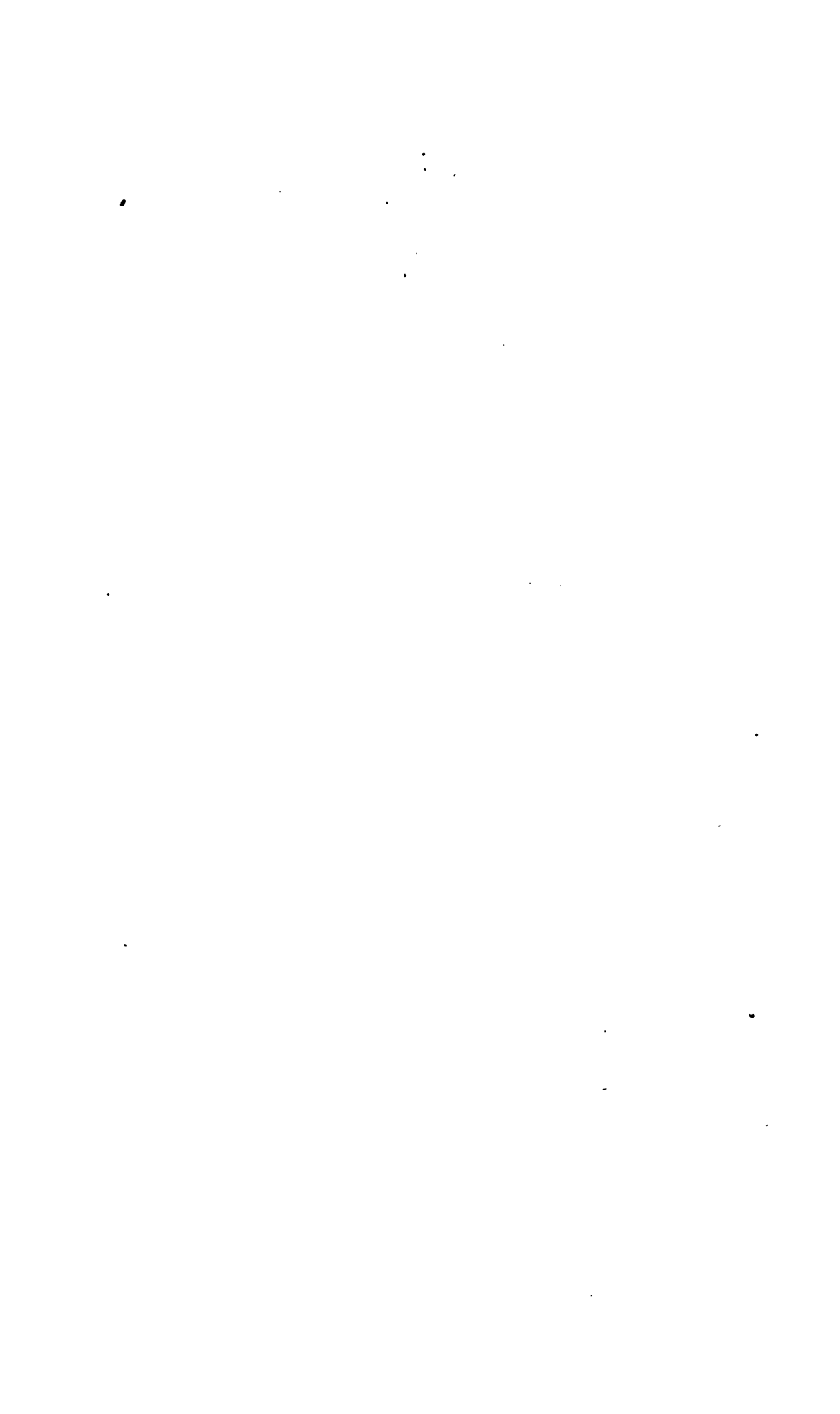
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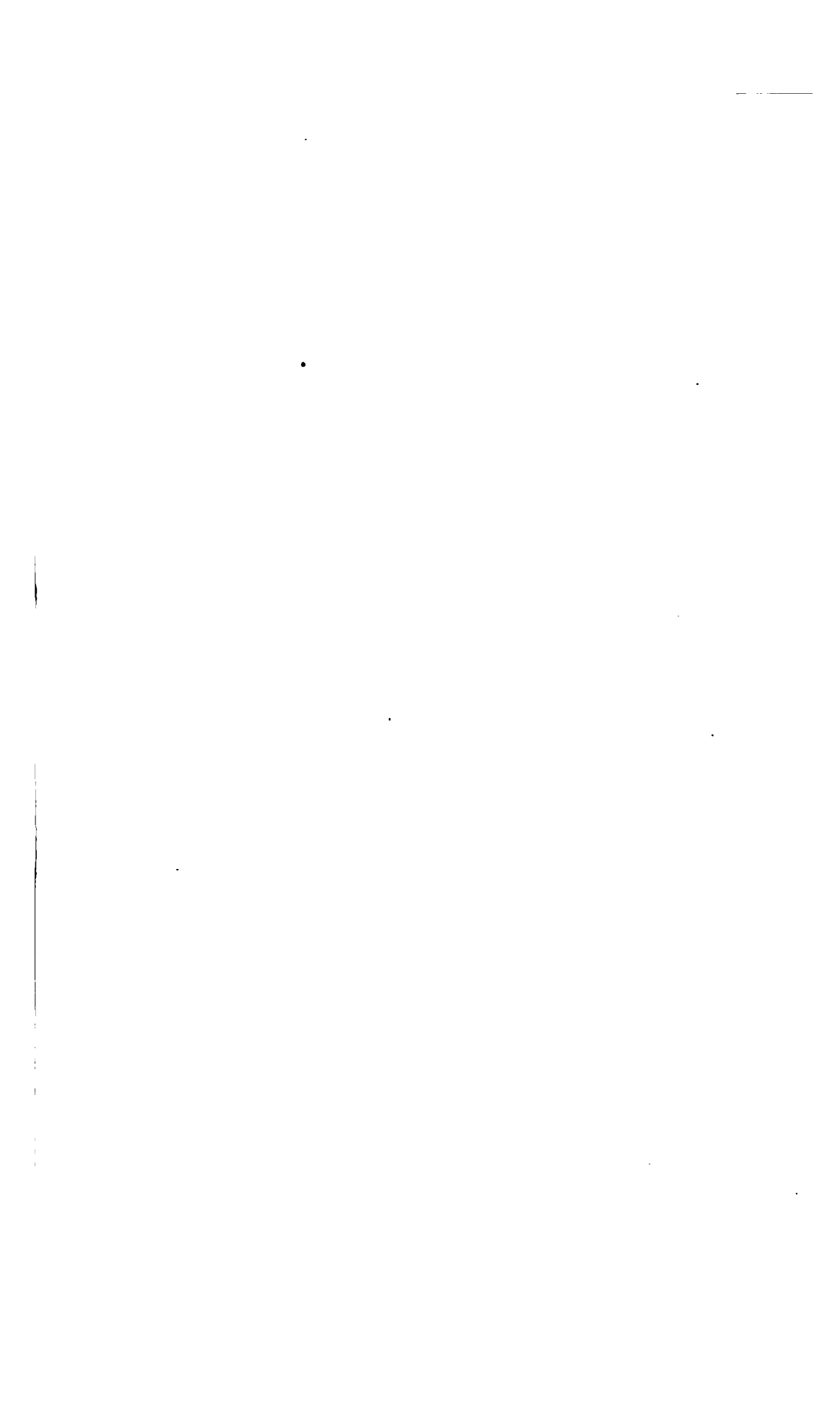


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Under the Supervision of

J. K. ROBERTS, ESQ., OF THE KENTUCKY BAR

VOL. X.

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KENTUCKY COURT OF APPEALS

POWERS AND WIFE v. TYLER, ET AL.

Judgments—When Void.

A proceeding to sell the lands of infants and married women must conform to the provisions of the Revised Statutes, and a judgment rendered in such a case is void when such provisions are not complied with.

Pleading Mere Conclusions.

A petition will be held insufficient where its allegation was that a judgment was void, and it does not aver the facts on which that mere legal conclusion was based. The facts relied on to render a judgment void must be pleaded.

Exhibits.

A pleading that is bad on its face cannot be helped out by an exhibit.

APPEAL FROM DAVIESS CIRCUIT COURT.

May 27, 1878.

OPINION BY JUDGE COFER:

The appellants alleged that Mrs. Powers was the owner of an interest of one-fifth in the several parcels of land described in the petition, and that the appellees were each in the possession of a separate parcel, claiming the same under a judgment and sale made in the case of Tyler v. Hawe's Heirs, and then in order to show that Mrs. Powers was not divested of her interest by the judgment and sale, they alleged that both were void.

The suit of Tyler v. Hawe's Heirs was a proceeding to sell the lands of infants and married women, and should have conformed to the provisions of the Revised Statutes. Such judgments are void unless certain requirements of the statute were complied with, and it is insisted in argument that the judgment, under which it was alleged that the appellees were holding, was void for two or three reasons.

But the allegation in the petition was that the judgment was void, without attempting to state the facts on which that mere legal con-

clusion was based. The court in which the judgment was rendered is a court of general jurisdiction. It had exclusive jurisdiction of such causes as that of *Tyler v. Hawe's Heirs*; and having jurisdiction of the subject-matter, it must be presumed that all was done that was necessary to authorize it to pronounce the judgment rendered, until the contrary be made to appear.

It was, therefore, necessary to state in the petition the facts relied on to render the judgment void. The principal fact relied upon in argument is that Mrs. Powers, then an infant, was not a party to the action, and it should have been so alleged. It is true the record of the old suit was made a part of the petition, and that it appears from that record that Mrs. Powers was not a party. But upon a well settled rule of pleading, a petition bad on its face cannot be helped out by an exhibit. *Rowan's Ex'r v. Pope's Adm'r*, 14 B. Mon. 102; *Murphy v. Estes*, 6 Bush 532.

If the exhibit had not been produced upon the trial of the cause, the court must have presumed that it was such as to authorize the judgment. Hence we are of the opinion that the petition was insufficient, and the judgment must, for that reason, be *affirmed*; and this conclusion renders any discussion of other questions made in argument unnecessary.

G. W. Williams, for appellants.

C. Riley, W. N. Sweeney, for appellees.

W. R. VINNAN *v.* COMMONWEALTH.

Criminal Law—Indictment.

In a charge of selling spirituous liquors under Sec. 5, Art. 3, Chap. 92, Gen. Stat., without a license, it is not necessary to set forth the fact showing the accused was a merchant within the meaning of the statute, nor that the sale was made in the line of his business as a merchant.

APPEAL FROM OWEN CIRCUIT COURT.

September 7, 1878.

OPINION BY JUDGE HINES:

The indictment in this case is under Sec. 5, Art. 3, Chap. 92, of Gen. Stat., and charges that the appellant, being a merchant without license, sold spirituous liquors. It is contended that the indictment is insufficient because it does not set forth the fact which

shows that the appellant was a merchant within the meaning of the statute, nor that he did the selling in the line of his business as merchant. We are of the opinion that this was not necessary. The word "merchant" in the statute is used in the ordinary sense and, as defined in Sec. 2, Art. 2, Chap. 106, Gen. Stat., to mean one whose business is that of retailing merchandise. To constitute the offense it is necessary only that the party should be a merchant in this sense, and sell liquor in any quantity without first having obtained license. We do not feel justified in interpolating in the statute the words "in the ordinary course of his business as merchant." Nor does it follow that with that construction it would be necessary to so allege in the indictment. This is unlike the offense of peddling without license. In that case the statutes not only define who shall be deemed peddlers, but they specify the various ways and acts in and by which the offense may be committed. The case cited by appellant's counsel, of *Commonwealth v. Dudley*, 3 Met. 221, arising under the above mentioned statutes, has no application here.

We perceive no error in the exclusion of the evidence of J. M. Smith. The fact that appellant had been for years engaged in the manufacture of whisky and that the liquor sold was of his making is entirely immaterial. He is as much amenable to the statute, under the circumstances mentioned in the indictment, for selling liquor of his own manufacture as he would be for selling that manufactured by anyone else.

Judgment affirmed.

H. P. Montgomery, P. M. Major, for appellant.

Moss, for appellee.

IN RE THOMAS C. JONES.

Right of Elected Person to Qualify as Clerk of the Court of Appeals.

One elected as clerk of the Court of Appeals, upon presenting the certificate of the board of examiners, showing that a majority of the votes cast for clerk of the Court of Appeals were cast for him, and offers to execute his official bond with sufficient sureties and to take the oath prescribed by law, there is no legal authority to refuse to permit him to do so.

September 8, 1878.

OPINION BY CHIEF JUSTICE PETERS:

In the matter of Thomas C. Jones, who, claiming to have been elected clerk of the Court of Appeals of Kentucky, moved the court

to be permitted to execute the official bond, take the oaths prescribed by law and enter upon the discharge of the duties of his office, he produced to the court the certificate of James Stewart, a circuit judge of the commonwealth of Kentucky, bearing date the 25th of August, 1866, and he was qualified to discharge the duties of clerk of the superior and inferior courts of this commonwealth.

He also produced to the court the certificate of the board of examiners of the returns of the election for August, 1874, from which it appears that a majority of the votes cast at the election held on the first Monday in August, 1874, for clerk of the Court of Appeals was cast for said Jones, and it was shown to the satisfaction of the court that the persons offered as his sureties in his official bond were good and altogether sufficient. •

But Mr. John B. Cochran objected in court to Jones' qualifying and entering on the discharge of the duties of the office aforesaid, because, as he alleges, at the time of the election, said Jones was not eligible to said office for reasons specifically set forth in a writing filed, and claims that as he received the next highest number of votes cast at said election for clerk of the Court of Appeals he is entitled to the office. He furthermore says in said writing that he has given notice to Jones that he will, before the proper board, contest his right to said office, and ask the court to refuse the motion of Jones to qualify until the contesting board shall have determined who is entitled to the office.

There is an apparent inconsistency or discrepancy in Sec. 1, Art. 11, Chap. 33, and Sec. 15, Chap. 81, of the General Statutes. The first section named provides that the governor shall commission all officers elective by the voters of the whole state, other than the governor and lieutenant-governor, or of any judicial district, and also the chancellor of the Louisville Chancery Court. Section 15 of Chap. 81 enumerates specifically what officers shall be commissioned by the governor; and as in that enumeration the clerk of the Court of Appeals is not included, the comprehensive language of the first section quoted must be held to be restricted by the last section to the officers therein specifically named. Indeed, it may be considered that the last-named section was enacted for that special purpose, as there is no other perceptible object therefor.

We therefore conclude that upon the presentation of the certificate of the board of examiners, showing that a majority of the votes cast for clerk of the Court of Appeals at the August election, 1874,

were cast for Jones, and his offer to execute his official bond with good and sufficient sureties and to take the oaths prescribed by law, this court has no legal authority to refuse to permit him to do so and to enter on the discharge of the duties of his office.

But this proceeding will not interfere with the right of the contesting board to proceed in the performance of the duty devolved on it by law.

JAMES WILSON v. COMMONWEALTH.

Bail Bond—Forfeiture of Bail.

To enable the commonwealth to recover on a forfeited bail bond it is only necessary to show that there has been a substantial compliance with the provisions of the statute in regard to giving and accepting bail.

APPEAL FROM BARREN CRIMINAL COURT.

September 9, 1878.

OPINION BY JUDGE HINES:

From the record in this case it appears that on the 23rd day of January, 1877, a warrant was issued by the police judge of the town of Glasgow, charging Thomas Eubank with grand larceny; that an examination was had before the police judge, on the 24th day of January, and the accused held to answer at the next term of the Barren Criminal Court, the order providing that he might give bail in the sum of fifty dollars. There is also a bail bond in the usual form, dated February 24, 1877, executed by James Wilson, who makes affidavit to his solvency before the police judge. This bail bond, though in the possession of the clerk of the criminal court, is not marked filed as the other papers referred to were. An indictment was found against Eubank, and failing to appear, the bond was forfeited, and to the summons thereon Wilson demurred; the demurrer was overruled and judgment entered against him, from which this appeal.

The defendant was legally in custody, charged with a public offense, at the time of the execution of the bond, as there is no order of release nor other evidence of his being at liberty between the date of the arrest and of the execution of the bond.

The police judge had authority to accept bail, even if there had been a formal order of commitment, and it appeared to the court

that the execution of the bond before the judge authorized to take it, accompanied by affidavit as to solvency of the bondsman, amounts to an acceptance of the bond, which operates to release the defendant. The bond was executed by Wilson in consideration of the immediate release, which, taken in connection with the fact that shortly afterwards the defendant was at liberty, is sufficient evidence that his freedom was secured by the execution of the bond. The record evidence is certainly sufficient for the commonwealth to declare upon, and if the conclusions naturally deducible therefrom are incorrect the appellant should have made it so appear in evidence. The 85th section of the Criminal Code clearly shows that a substantial compliance with the provisions in regard to giving and accepting bail is required. Judgment *affirmed*.

L. McQuown, for appellant. Moss, for appellee.

CHARLES W. SWEENEY *v.* E. D. KENNEDY'S ADM'R, ET AL.

Principal and Surety—Defense.

It is no defense for sureties on a note to show that the money secured by their principal was used for illegal purposes. Their contract primarily was with the creditor who loaned the money to the principal upon the security.

APPEAL FROM GARRARD COURT OF COMMON PLEAS.

September 10, 1878.

OPINION BY JUDGE PRYOR:

It is needless to review the authorities relied on by counsel in support of the supplemental petition to which a demurrer was sustained.

It is not alleged that the appellees used the money for illegal purposes, or that they derived any benefit from its illegal use by others. There was no contract between the sureties and their principal that the money should be used in securing notes, and so far as the facts are developed by the statements of the petition, the mortgage to the sureties, as well as their liability to the obligee, in no manner depends on the application of the money to advance the claims of the obligor, Kennedy, as a candidate for clerk; nor was Kennedy under any obligation to use the means obtained from Bruce for that particular purpose. "The test is whether the con-

tract on which the claim was founded can be wholly disconnected from the illegal transaction, or whether it was in furtherance thereof." Story on the Law of Sales, p. 614. This is certainly not as strong a case as if the sureties had occupied the place of the obligee and loaned the money to Kennedy, knowing that his intention was to use it for electioneering purposes. In the case of *Hedges v. Wallace*, 2 Bush 442, it was held that the mere knowledge of the illegal purpose for which the goods are purchased will not affect the validity of the sale, but there must be some participation or interest on the part of the seller in the act itself. The ruling in this case has been recognized by several manuscript opinions. *Lockridge v. Clark*, 4 Ky. Opin. 501.

The liability of the sureties of Kennedy to them is conceded. It is not pretended that they used the money in buying notes, or caused it to be done, or derived an benefit whatever from the expenditure. Nor is it shown that they became bound as sureties on the condition that the money was to be so used. The relation of principal and surety exists independently of any other agreement than their obligation to them to pay the money. The decided weight of authority sustains this view of the question raised, and the judgment of the court below sustaining the demurrer is now *affirmed*.

Wm. McKee Duncan, for appellant.

Walton & Kauffman, Burdett & Hopper, for appellees.

A. B. KING v. COMMONWEALTH.

Criminal Law—Obstruction of Public Highway.

One cannot be guilty of obstructing a public highway by erecting a fence across it where there has been a proceeding to change a highway and the new way has been opened and used by the public in lieu of the one obstructed; the establishment of the new is a discontinuance of the old, and this is true even in the absence of a formal order accepting the new or abolishing the old road.

APPEAL FROM WHITLEY CIRCUIT COURT.

September 10, 1878.

OPINION BY JUDGE COFER:

Appellant was indicted and fined \$150 for obstructing a public road. The evidence tends to show that the obstruction complained

of was a fence erected across a road that had been used by the public many years, and that appellant was the surveyor of a new road, opened by order of the county court, parallel to the old road.

Appellant complains, among other things, of the action of the court in giving the following instruction: "That although they may believe from the evidence, that the county court had adopted a review, establishing a change in said road, and located it at a point different from where the fence was built, and also authorized the opening of said new way, yet until said court accepted the new way, and accepted same in lieu of the old way, there was no authority to close up the former way."

It would doubtless be difficult for the jury to determine which of the roads the court had reference to, in the use of the expression "former way," at the close of the instruction, but taking it to have reference to the old road, we think the court erred in telling the jury that the new road must have been viewed and accepted by the county court in lieu of the old one. That portion of the instruction was clearly misleading. If the new road was established on an application to change the old road, the road opened, used by the public, and surveyor appointed as in this case, the establishment of the new was a discontinuance of the old, and so operated without any formal order accepting the new or abolishing the old. The court ought to have told the jury what it takes to constitute a public road within the meaning of the statute, and should not have left it to them to determine what action on the part of the county court would be sufficient to abolish or establish a road. The jury were left to conjecture in this, and to settle for themselves what was meant by acceptance by the county court.

Wherefore the judgment is *reversed*, and cause remanded for further proceedings consistent with this opinion.

C. W. Lester, for appellant. Moss, for appellee.

HENRY BELL *v.* RICHARD MANSFIELD.

Quieting Title—Duty of Plaintiff to Furnish Proof.

A plaintiff asking the chancellor to quiet his title is required before he can succeed to make his right to the relief asked reasonably clear, and where the court from the evidence is unable to arrive at a satisfactory conclusion upon the merits of the controversy, the court will affirm the judgment of the chancellor.

APPEAL FROM HART CIRCUIT COURT.

September 10, 1878.

OPINION BY JUDGE COFER:

Each party sets forth in his pleading a defined boundary and asserts title in himself thereto, and controverts the title of the other to the extent of the interference.

No survey and connected plant were made so as to indicate to the court the location or extent of the interference. Neither party has exhibited a valid paper title, and the evidence of possession and adverse holding on each side for a long period is quite conflicting, and besides is very vague and unsatisfactory. After a careful reading of the record and the briefs of counsel for appellant (none is on file for appellee), we are unable to arrive at any satisfactory conclusion upon the merits of the controversy. Under such circumstances it is the duty of this court to affirm the judgment of the chancellor, especially as the appellant was the plaintiff below.

Coming into court to ask the chancellor to quiet his title, he should have made his right to the relief asked reasonably clear, and not having done so his petition was properly dismissed.

Judgment affirmed.

Isaac T. Goodson, George T. Read, A. J. and D. James, for appellant. J. P. Curle, for appellee.

JOHN THERNERLING v. COMMONWEALTH.**Criminal Law—Sale of Whisky by Merchant Without License.**

A merchant is one who sells or deals in goods, wares and merchandise, and it is not necessary that he should have a fixed place of business in order to be guilty of selling liquor as a merchant without a license, under the statute prohibiting such sales by unlicensed merchants.

APPEAL FROM TRIMBLE CIRCUIT COURT.

September 11, 1878.

OPINION BY JUDGE PRYOR:

Waiving the question as to whether the appellant, being a merchant in Louisville, could be indicted in Trimble when he procured the whisky from his storehouse in Louisville and sold in Trimble,

we are clearly of the opinion that he was a merchant within the meaning of the law in the county of Trimble.

It is not necessary that the room from which the goods, etc., are sold should be stationary. It may be on wheels or sold from the wagon of the peddler. He sold groceries such as sugar and coffee and dry goods, for money and in exchange for produce from his wagon in the county of Trimble. This constitutes him a merchant, and the charge that he was a merchant and dealt in goods, wares and merchandise in the county of Trimble is sufficient to constitute the offense, with the additional charge that he sold the whisky. That he was a merchant and sold the whisky in Trimble county without license is a sufficient charge that he was a merchant in Trimble county.

A merchant is one who sells or deals in goods, wares and merchandise, and it is not necessary that he should have a fixed place of business. A public offense was not only charged but proven in this case, and the motion in arrest of judgment was properly overruled. Judgment *affirmed*.

Strather & Orr, for appellant. Moss, for appellee.

I. N. WEBB, ET AL., v. COMMONWEALTH.

Injunction Against Operating a Lottery.

One who under an existing statute acquires a right to operate a lottery is not affected by a repeal of the statute. Such a statute is in the nature of a privilege, and where rights have become vested under it the legislature cannot revoke the privilege thus granted.

Waiver of Privilege by Non-User.

Where a statute grants a mere privilege, so long as the purposes for which the act was passed are being accomplished a failure to use it cannot be complained of by the state. The mere failure to exercise a right or privilege under a grant, in the exercise of which the commonwealth has no interest, cannot be held to work a forfeiture.

APPEAL FROM FRANKLIN CIRCUIT COURT.

September 11, 1878.

OPINION BY JUDGE HINES:

By an act of the legislature, approved December 9, 1850, the appellant, I. N. Webb, and others were authorized to raise by lottery, for the Henry Academy and Henry Female College, a sum not to

exceed \$50,000, but such of them as chose to accept its provisions are required, before acting thereunder, to execute and file in the Henry County Court a bond in the sum of \$100,000, conditioned for the faithful performance of their duties under the act. The third section empowers them to sell the schemes or any class thereof, but before their vendees are permitted to have a drawing of the lottery they are required to give bond to comply with the provisions of the act, and to file the same in the Henry County Court.

The commonwealth, by the attorney general, filed in the Franklin Circuit Court a petition against the appellants and S. T. Dickinson, Z. E. Zinnerman and others, as vendees of said managers, in which it is sought to perpetually enjoin them from using the grant. A general and a special demurrer to the petition were overruled; and the appellants answering, a demurrer to their answer was sustained and judgment entered in conformity to the prayer of the petition.

The petition shows that the managers, December 19, 1850, sold to William Gregory the exclusive right to operate the lottery for the sum of \$50,000, to be paid in annual installments of \$1,000 each, and that under that contract the sum of \$23,500 has been paid to the managers for the purposes mentioned in the act. Gregory assigned his interest in the grant to Zinnerman, which was ratified by the managers.

It is contended by the commonwealth that Sec. 6, Art. 21, Chap. 28, Revised Statutes, repealed the act under which appellants claim. That section reads as follows: "Three years after this chapter takes effect, all rights and privileges which may have been granted by the legislature of this commonwealth to raise money by lottery for any purpose shall cease and terminate."

The Revised Statutes went into effect on the first day of July, 1853, and this section became operative on the first day of July, 1855. As the managers sold the grant to Gregory on the 19th of December, 1850, and he regularly paid the annual installments of \$1,000 to the managers for the use specified in the act, we are of the opinion that Gregory, before the adoption of the Revised Statutes, had acquired such rights, under and upon the faith of the act of December 9, 1850, that the attempted repeal cannot affect him or his assignees.

In the case of *Gregory's Ex'x v. Trustees of Shelby College*, 2 Met. 589, this court said: "If the rights have been acquired, or

liabilities incurred, upon the faith of the privilege conferred by the grant, it would be obviously unjust to permit such rights to be divested by a legislative revocation of the privilege. If, therefore, any vested rights have been acquired, under the present grant, before the passage of the repealing law, then, to the extent of such rights at least, that law must be regarded as unconstitutional and inoperative."

It seems clear that the execution of this contract and the compliance on the part of Gregory gives him and his assignees a vested right to use the franchise to reimburse themselves to the extent of their obligation.

The attorney general contends, however, that the managers at the time of making the contract with Gregory had not executed the bond required of them by the act, and as its execution was a condition precedent to the exercise of any right under the grant the contract between Gregory and the managers vested no right whatever in Gregory, and that he had none at the time of the passage of the repealing act. The failure of the managers to execute the bond, if there was a failure, should have been specifically set forth in the petition. The general allegation that the defendants failed to execute bond, without designating the bond referred to or the defendants whose duty it was to execute the bond, in view of the requirements of the act, is manifestly too vague and not traversable. If that be not the case the context clearly shows, by proper construction of the language of the petition, that the bond referred to is the bond required to be executed by Sec. 3 of the article, and as this bond is not required to be executed unless there shall be a drawing, and there having been no drawing by Gregory or his assignee, it is an immaterial averment.

The attorney general also claims that the right to make use of the grant has been forfeited by non-user. It seems to us that this is a mere privilege, and that so long as the purposes for which the act was passed are being accomplished a failure to use it cannot be complained of, even if it could be under other circumstances.

"In general, the abuse or neglect must be something more than accidental or casual negligence, excess of power, or mistake in its exercise. In order to make a forfeiture, there must be something wrong arising from wilful abuse, or improper and persistent neglect." *Minor's Institutes*, 583. The mere failure to exercise a right

or privilege under a grant, in the exercise of which the commonwealth has no interest, cannot be held to work a forfeiture.

When a special judge had been elected and presided it was error for the regular judge at the succeeding term to preside on the trial of the case without the consent of the parties, but as no objection was taken in the court below and no injury could have resulted we must presume consent, and the court will not disturb the judgment for that reason.

We perceive no error in the failure of the court below to sustain the demurrer for defect of parties. The commonwealth may proceed against any or all of the parties claiming to exercise privileges under the grant, and restrain them, if found to be acting without authority, although the parties for whose ultimate benefit the grant was created are not before the court.

Judgment *reversed* and cause remanded with directions to dismiss the petition.

T. F. Hallan, for appellants. Moss, for appellee.

J. C. McKINLEY v. COMMONWEALTH.

Criminal Law—Sending Threatening Letter—Indictment.

A motion to quash an indictment charging a defendant with having sent a threatening letter should be sustained where the threatening letter charged to have been sent was not set out either literally or substantially in the indictment.

Motion to Quash—Demurrer.

A motion to quash an indictment is equivalent to a demurrer.

APPEAL FROM HENDERSON CIRCUIT COURT.

September 11, 1878.

OPINION BY JUDGE ELLIOTT:

This indictment charges the defendant with having sent one P. B. Matthews a threatening letter "in which he threatened to fill Henderson with circulars, a copy of which was enclosed in said letter and in which he falsely charged said Matthews with maliciously lying, with breaking his engagements, violating his word, and other acts calculated to injure and degrade said Matthews in the community, unless said Matthews would by a named day send \$128 to the wife of said McKinley at Louisville, Kentucky, said letter being

signed by McKinley and designed to extort money from said Matthews."

By Art. 6, Chap. 29, Sec. 3 of the General Statutes, it is made a felony to knowingly send to another a letter threatening to kill him or do him or his wife or children harm, or burn or destroy his house or other property, or to accuse him or his wife of a felony with the intention to extort money, etc., from him.

This indictment, it seems, was not drawn under this law, but under an act to amend Chap. 28 of the Revised Statutes, approved April 11, 1873. By Section 1 of this Act it is provided that "If any person shall send circulars or exhibit or put up a threatening notice or letter signed with such person's own and their names, or anonymously, he shall on conviction thereof be fined not less than one nor more than five hundred dollars, and imprisoned in the county jail not less than three months.

The letter and circular referred to in this indictment were produced and read before the court and jury on the trial over the objections and exceptions of the appellant, his motion to quash the indictment having been previously overruled and excepted to. We are of the opinion that the court should have sustained appellant's motion to quash the indictment because the threatening letter charged to have been sent to Matthews was not set out either literally or substantially in the indictment.

It was necessary to set out the contents of the letter, not only to inform the defendant of the offense charged, but to enable the court to determine whether the letter thus sent to Matthews was such a one as would amount to a violation of the statute.

It is stated as a general principle in Wharton's American Criminal Law, page 308, that "When a written instrument enters into the gist of the offense, as in forgery, passing counterfeit money, selling lottery tickets, sending threatening letters, libel, etc., they should be set out in words and figures. In forgery, as will be seen hereafter, the indictment may run that the prisoner forged a paper writing to the tenor and effect following. An exact copy of the instrument in words and figures must then be set forth to enable the court to see whether the false making of it is in law considered as forgery, and the same rule applies to indictments for threatening letters."

The same doctrine is laid down by Bishop on Criminal Procedure, Sections 971, 972, 973 and 974.

The Code requires that the offense of the accused shall be stated, and where the act consists of sending a threatening letter it is insufficiently stated unless its contents are stated in the indictment, for the court cannot know that the law has been violated unless the contents of the latter are embraced in the indictment.

As the indictment was insufficient we regard a motion to quash as equivalent to a demurrer, and if not, by a provision of the Code the court is authorized at any stage of a criminal or penal proceeding to quash an insufficient indictment, and in this case it was its duty so to do on appellant's motion.

Wherefore the judgment is *reversed* and cause remanded with directions to dismiss the indictment.

W. P. D. Bush, for appellant. Moss, for appellee.

A. DANIEL, ET AL., v. G. W. HINES.

Bills of Exceptions—Change of Remedy.

Subdivision 2 of Sec. 337 of the Act of February 27, 1878, Rev. Stat., authorizes the filing of bills of exceptions during the term at which the judgment becomes final, and though not in existence at the time the appeal is taken, since it affects the remedy only, it applies to it.

Wills—Undue Influence.

Mere acts of kindness or persuasion are not sufficient to invalidate a will, but when the party charged with the exercise of undue influence has acquired such control over the mind of the testator as to direct its action against his will with no power of the testator to resist, it amounts to undue influence. Actual coercion or threats need not be established.

APPEAL FROM BALLARD COURT OF COMMON PLEAS.

September 12, 1878.

OPINION BY JUDGE PRYOR:

By an act approved February 27, 1878, Subsec. 2 of Sec. 337, Revised Statutes, was so amended as to authorize the filing of bills of exceptions during the term at which the judgment becomes final. The act, though not in existence at the time the appeal in this case was taken, affecting as it does the remedy only, must be held to apply to it, and therefore the objection that no leave was given to file the exceptions at a particular day is not available. The second

section of the amendment applies the law to all appeals pending, or which may thereafter be prescribed.

The instructions are in direct conflict with the principles recognized in *Lucas v. Cannon*, 13 Bush 650. Undue influence, as defined in each of the instructions, is such as must have constrained and coerced the testator to sign and acknowledge the paper contrary to his own will. While those learned in the law understand the meaning of the word coercion and its application to the issue involved, a juror might well conclude that force must have been used, or threats such as would intimidate and compel the testator to sign the paper, before it amounted to undue influence. Mere acts of kindness or mere persuasion will not be sufficient to invalidate a will, but when the party charged with the exercise of the improper or undue influence has acquired such a control over the mind of the testator as to direct its action against his will, with no power on the part of the testator to resist, and such influence is operating on and controlling the action of the testator in the disposition of his property at the time he makes the will, it amounts to undue influence, and actual coercion or threats need not be established. One so much under the control of another cannot be said to have a disposing mind. It is not necessary that the party charged with exercising the influence should in person bring the influence to bear in the very act of devising, but it is sufficient if the influence is exercised before the will is actually signed. If the improper and undue influence is operating on the mind of the testator at the time, and causing him to make a will contrary to his own mind, the will has no validity. Instruction No. 2, that says "If George Hines brought such influence to bear in the very act of devising," etc., is misleading and should not have been given.

Instruction No. 6 is also erroneous. The court said to the jury that if they had doubts as to the sanity of the testator, and the evidence is in equipoise, the presumption of sanity arises. This, as an abstract proposition of law, is correct; but in what measure was it understood by the jury? If they doubted the sanity of the testator they may have regarded the evidence as equally balanced, and that the doubt should be resolved in favor of the propounders of the will. One of the issues in this case is, has the testator, of sound and disposing mind and memory at the time the alleged paper was executed, proof of the due execution of a will rational in its provisions, making out for the propounder a *prima facie* case? That

is, the law upon such a state of facts presumes the testator to have been of sound mind at the time of its execution; and the burden is then shifted to those who are contesting the paper, and in such a case, when passing on the question of sanity, the jury must believe from a preponderance of the testimony that the testator, at the time he executed the paper, was of unsound mind, before they can find against the will on that issue.

The number of instructions given in this case was calculated to confuse the jury, and while every issue should be fairly presented, mere abstract questions of law should not be embodied in an instruction, in the proper application of which the lawyer is sometimes involved in doubt. For the reasons indicated the judgment is *reversed* and the cause remanded for further proceedings consistent with this opinion.

C. S. Marshall & Son, J. D. White, for appellants.

Bugg & Bishop, for appellee.

W. R. PAYNE v. SALLY MCQUINN'S EX'R, ET AL.

Construction of Will.

A will which provides, "I own a brick house and certain lots of ground belonging thereto, in Warsaw * * * these, the said house and lots, I give and bequeath to my niece, Sally Elmore, wife of Oliver Elmore, and her children; but I design and it is my will that this property shall be for the use and benefit of my mother, Mary Spencer, during her natural life, then to descend to said Sally Elmore and her children as aforesaid," where the mother died before the testator, it was held that the devise was in fee simple to Sally Elmore and all of her children in equal parts, including one born after the execution of the will.

APPEAL FROM GALLATIN CIRCUIT COURT.

September 12, 1878.

OPINION BY JUDGE HINES:

This is a suit to have construed the following clause of the will of Mrs. Sallie M. McQuinn: "I own a brick house and certain lots of ground belonging thereto, in Warsaw, Gallatin county, Kentucky, now occupied by my brother, Preston H. Spencer; these, the said house and lots, I give and bequeath to my niece, Sally Elmore, wife of Oliver Elmore, and her children but I design and it is my

will that this property shall be for the use and benefit of my mother, Mary Spencer, during her natural life, then to descend to said Sally Elmore and her children as aforesaid."

The will bears date November 4, 1870, but the date of the death of Mrs. McQuinn is not given in the record. Mrs. Mary Spencer died before the testatrix, Oliver Elmore, Jr., was born on the 20th of August, 1871.

We are asked to say what interest Sally Elmore and her children take in this property, and whether Oliver Elmore, Jr., takes anything. The court below held that the devise was in fee simple to Sally Elmore, and all of her children in equal parts, there being six children, including Oliver, born after the execution of the will. This we think is unquestionably correct. The expression "her children" designates with sufficient accuracy the persons intended to be benefited by the devise, and embraces any child born within the statutory and common-law period of gestation, that is within ten months after the death of the testator.

In *Powell v. Powell*, 5 Bush 619, the conveyance was to the wife and her children. After the date of conveyance a child was born to the wife, and the court held that the child eo instanti became a joint tenant with her mother by the legal effect of the deed to her as prospective co-purchaser.

In *Proctor v. Smith*, 8 Bush 81, it was held that a devise to the mother and her then children conjointly, naming them, gave the mother and children one-fourth of the devise each.

Judgment affirmed.

J. J. Landrum, for appellant.

HOME INS. CO., OF NEW YORK, *v.* JOHN C. GADDIS & CO., ET AL.

SAME *v.* MARY A. BOWEN, ET AL.

Insurance Policy—Notice and Proof of Loss.

When an insurance company refuses to pay a loss on other grounds than its failure to receive notice and proof of loss, and goes into court asking for a cancellation of the policy, it cannot justify itself by showing that proper proof had not been made of such loss.

Assignment of Policy.

When a policy provides that "if this policy shall be assigned before a loss without the consent of the company indorsed hereon" the policy shall be void, it is held that although parties may agree that a contract reduced to writing shall not be modified unless the agreement for such modification be by writing, still a subsequent agreement by parol to modify will be valid; and where it is shown that the company, by its agent, agreed to the assignment of the policy by parol the company is bound by it.

APPEAL FROM CAMPBELL CHANCERY COURT.

September 12, 1878.

OPINION BY JUDGE COFER:

Each of the appellants made its answer in the consolidated actions of *Gaddis & Co. v. Mary A. Bowen and Mary J. Hickman* a cross-petition against Mrs. Hickman, and called upon her to set up any claim she had under the policies on the Cold Spring property, and asked that said policies be adjudged void and be canceled.

In these cross-petitions, which were filed in May, 1875, it was alleged that the property covered by the policies were destroyed by fire December 1, 1874, and that the assured had failed to give immediate notice of the loss, and to make out and furnish to the companies preliminary proofs of the loss as required by the policies, and that on account of such failure the policies had become void.

It was also alleged that the property insured did not belong to Mrs. Hickman, but was held by her in trust for her mother, Mrs. Bowen, and that Mrs. Hickman had concealed from the insurers divers incumbrances on the property which were unknown to them, and that the policies were on that account void.

They each made their answer a cross-petition against Mrs. Hickman and called upon her to set up her claim, and then prayed that the policies might be cancelled. In a separate answer to each of these cross-petitions Mrs. Hickman alleged that she did give notice to each of the companies immediately after the loss; and she also alleged facts intended to show that the furnishing of preliminary proofs required by the policies had been waived; she denied all allegations of fraud, and the alleged concealment of incumbrances on the property, and alleged that she disclosed fully and in good faith all existing liens. She made her answers counterclaims against the companies, and prayed for judgment against each for the amount of its policy.

To these answers replies were filed; a trial was had and judgments rendered in her favor as prayed for, and from these judgments these appeals are prosecuted. We need not enter into the question whether there was a waiver of the preliminary proofs by anything occurring prior to the filing of the cross-petitions by the appellants.

In their cross-petitions the companies assumed that it was then too late to make the preliminary proofs, and that as such proofs had not been made they were discharged from liability, and for this, among other reasons, sought to cancel the policies. The facts disclosed certainly excused an earlier presentation of the proofs, if they did not show a waiver of the right to insist upon such proofs being made at all, and having called upon the assured to assert her claim and at the same time asked to have the policies cancelled as no longer obligatory on them, they clearly cannot now be heard to say that the suits were premature, or to have them dismissed because the proofs were not made, and especially so when they distinctly refused to pay upon other grounds, and relying on these grounds have themselves come into court to have the policies cancelled.

By the terms of the policies the assured could not maintain actions thereon without making the required preliminary proofs, but when the companies denied their liability and refused to pay upon other grounds, which would not have been removed by such proofs, then the proofs would have been vain and futile, and therefore need not be made. It is a well settled principle of the law of contracts, as applicable to contracts of insurance as to any other class of contracts, that if one party to a contract gives notice that he will not perform his part such refusal is of itself a breach of the contract, and the other party in suing on it need not allege performance or readiness to perform conditions which he would have been otherwise required to perform or offer to perform before commencing suit. Bishop on Contracts, § 692.

The companies, having by their cross-petition given notice that they would not pay in any event, violated their contract, and the assured had a right to sue without furnishing the requisite preliminary proofs, or showing that its production had been otherwise waived. Upon the question whether the state of the title and the incumbrances on the property were truly stated to the agents of the companies, the evidence is conflicting. Mrs. Bowen, Mrs. Crews and Mrs. Hickman all swear that it was.

The agent for the Home and the Franklin does not distinctly deny

in his testimony that the incumbrances were made known to him. He admits that at least one was disclosed; and it is quite natural to infer that as the subject of incumbrances was discussed and one was disclosed, all were disclosed. The agent of the Aetna says no incumbrances were disclosed to him, but the court below found the fact against him, and this court cannot on the evidence before it reverse that finding.

The allegation that the conveyance to Mrs. Hickman was in fraudulent trust for Mrs. Bowen is not sustained, and the judgments in favor of Mrs. Hickman must be affirmed.

The only defense relied upon to the policy insuring the personal property of Mrs. Bowen is that the policy was assigned to Mrs. Hickman before the loss without the knowledge or consent of the company. The policy contains a provision that "if this policy shall be assigned before a loss without the consent of the company indorsed hereon" the policy shall be void. It is not claimed that the written consent of the company to the assignment was ever obtained, but there is evidence conducing to prove that the agent who issued the policy had knowledge of and assent to the assignment.

Two or three witnesses swore that such consent was given, and the agent swore it was not given. The court below found that he did consent, and that finding will not be disturbed.

The validity of contracts must be determined by law, and not by stipulation between the parties, and although parties may agree that a contract which they have voluntarily reduced to writing shall not be altered or modified unless the agreement for such alteration or modification be evidenced by writing, yet a subsequent agreement by parol to alter or modify will be as valid as if no such stipulation had been in the written memorial of the original contract. And it follows that, having consented by parol to the transfer, the company is as much bound as if its consent were in writing. It results, therefore, that the judgment in favor of Gaddis & Co. must be affirmed so far as the appellants are concerned.

Counsel for Mrs. Hickman claims that the court erred in adjudging the proceeds of the policy to Mrs. Bowen to her creditors, and insists that such proceeds should have been adjudged to Mrs. Hickman. But no such question is or can be presented on this appeal. No cross-appeal by her against her co-appellees, Gaddis & Co., will lie. Such appeals can only be prosecuted by appellees against appellant.

The judgments must be affirmed on both the original appeals.

B. D. Smalley, A. Duvall, for appellant.

E. W. Hawkins, for Gaddis & Co.; F. M. Webster for Bowen, Etc., appellees.

W. T. BROOKS *v.* COMMONWEALTH.

Criminal—Sale of Liquor on Certificate of Physician—Indictment.

An indictment under the special Act of March 6, 1872, applying only to Rockcastle county, is insufficient which avers that "The said Brooks did * * * unlawfully sell to J. J. Williams, whisky and brandy by the quart, pint and half-pint, said sale not being made in small quantities for medical purposes on the prescription of a regular practicing physician then and there made and given," since no prescription is necessary under such act; but to justify such sale the purchaser must have a physician's certificate, and not a prescription.

APPEAL FROM ROCKCASTLE CIRCUIT COURT.

September 12, 1878.

OPINION BY JUDGE HINES:

This prosecution is under an act applicable only to Rockcastle County, approved March 6, 1872, and is an amendment to an act passed March 31, 1870. The second and third sections of the amendatory act is as follows: "That the second section of said act be so amended as to allow any person to sell spirituous liquors in small quantities for medical purposes; but before they shall be thus privileged to sell, they must receive the certificate of a regular practicing recognized physician, which they shall file and keep for protection."

"That before any physician shall be authorized to give a certificate for the purchase of spirituous liquors for medical purposes, he shall file with the clerk of the county court an affidavit, stating that he will not give a certificate to any person to purchase or obtain any brandy, whisky, or intoxicating liquors, or a mixture thereof, unless in his opinion the good of their health requires it, which affidavit shall be recorded by the clerk, and should any physician give any certificate without complying with this law, or any person sell without complying with the provisions of this amendment, they shall be subjected to all the pains and penalties of the original act."

The material part of the indictment found under these acts is as follows: "The said Brooks did, on the 2nd day of October, 1877,

in the county aforesaid, unlawfully sell to J. J. Williams, whisky and brandy by the quart, pint and half-pint, said sale not being made in small quantities for medical purposes on the prescription of a regular practicing physician then and there made and given, contrary to the form of the statutes," etc.

To this indictment a demurrer was filed, together with an agreed statement of facts, and the whole case submitted to the court, without the intervention of a jury, and judgment rendered against the appellant for one hundred dollars, from which an appeal was taken. The demurrer to the indictment was upon the ground only that the act under which it was found was unconstitutional. Nevertheless it is the duty of the court at any time, of its own motion, to quash or dismiss an indictment where it fails, as we think the indictment does, to charge a public offense. Every allegation in the indictment may be true, and yet appellant may be innocent of any offense under this special law. Under the law it is the certificate from the physician to the party selling that protects him, and not a prescription from the physician. The words "certificate" and "prescription" are not synonymous. "Certificate" means a written testimony to the truth of any fact, while "prescription" means the direction of remedies for disease and the manner of using them. The language used must be taken in its ordinary acceptation and the court has no power to torture it in order to bring the appellant within the statute. If the word "certificate" had been used in the indictment, to that extent it would have been good upon its face, and if the accused had attempted to justify the selling by exhibiting in evidence a paper given him by the physician it would have been for the court to determine whether it was such a paper as spoken of in the statute. The language of the statute descriptive of the offense should have been followed.

Judgment *reversed* and cause remanded with directions to dismiss the indictment.

Sam M. Burdett, for appellant. Moss, for appellee.

JOHN MADDEN, ET AL., v. MARY CRUNDY'S TRUSTEE, ET AL.

Homestead—Creditors' Rights.

One entitled to claim a homestead exemption may sell such right and such sale is not in fraud of creditors, for they have no interest in it and cannot sell it to satisfy their claims; so long as the debtor lives his homestead is freed from creditor's claims.

APPEAL FROM BOURBON CIRCUIT COURT.

September 14, 1878.

OPINION BY JUDGE PRYOR:

The failure of the court below to allot to the appellants the homestead or its value, if the property was indivisible, necessitates a reversal. The appellant, Madden, at the time he sold and conveyed the property to his niece, was a bona fide housekeeper and entitled to the benefit of the exemption. This homestead to the value of \$1,000 was not subject to the claims of creditors, and the proof shows that the entire property is not worth exceeding \$700. It is only in the event of the death of the owner of the homestead that the creditor can sell it, subject to the possession and occupancy of the children. While the owner is living on the homestead no sale under a judgment or execution can pass to the purchaser either a vested or contingent interest in it. He has the right to sell it and purchase another, and if the chancellor sells the property when it is indivisible he must have paid to the owner \$1,000 of the purchase money.

There is nothing in the statute preventing the owner from selling his homestead, and as the creditor is in no manner injured by it he cannot complain. If the property was of greater value than \$1,000 and indivisible, under the proof in this case it should have been subjected to the claims of creditors, giving first to the purchaser \$1,000 of the purchase money. Whether the business house or grocery is on the lot occupied as a homestead does not appear, but if it is and the entire lot is worth less than \$1,000 it ought not to be sold to pay the debts. In such a case there could be no fraud practiced on the creditors, as the appellant, Madden, had the right to give the property to his niece if he saw proper. If the lot in controversy does not exceed in value \$1,000 the petition should be dismissed. The judgment below is *reversed* and cause remanded for further proceedings consistent with this opinion.

Irvine Taylor, for appellants. Brent & McMillan, for appellees.

HARRIETT SCOTT v. GEORGE SCOTT.

Contract to Buy Real Estate, When Enforcible—Dower of Wife.

A verbal contract of sale of real estate, where the purchaser is put into possession, is voidable only by the seller; and where a father sells to his son and puts him into possession, but does not convey to him, and afterward marries, his wife has no right of dower in such land when her husband has not sought to avoid the sale. He had a right to confirm the sale and was bound in good faith to do so, and upon conveyance being made her marital interests were subject to his election on the subject, she could not avoid his contract to convey nor require him to avoid it.

APPEAL FROM SPENCER CIRCUIT COURT.

September 14, 1878.

OPINION BY JUDGE COFER:

The Adam Miller farm was bought by the father and two sons, and by the consent of all was conveyed to Robert.

When the farm in Nelson was purchased, it seems to have been intended by the parties for George, but the intention was not carried out. Robert deeded the Miller farm to George, and received a conveyance for the farm in Nelson. George was induced to enter into that arrangement by a verbal promise of his father to convey to him enough of the Heady farm to make the Miller farm equal to the farm in Nelson. And there was evidence conducing to prove that George was put in possession of the land he was to have off the Heady farm before the marriage of his father with the appellant; but whether so or not we do not regard as very important.

After the marriage of the father with the appellant, he executed to George a conveyance, in which she did not join, conveying to him a part of the Heady farm in compliance with his previous verbal agreement. The question then is, Is the appellant entitled to dower in the land thus conveyed to George? We concur with the court below in holding that she is not.

As appears from the foregoing statements of facts, there was a valuable consideration to uphold the father's verbal promise to convey to George so much of the Heady farm as when added to the Miller farm would be equal to the farm in Nelson. True, George could not have enforced that agreement, because it was verbal, but the agreement was not void, and as said by this court in *Oldham v. Sale*, 1 B. Mon. 76, the father "alone had a right to avoid or confirm

it during his life, and having confirmed it by the conveyance of 1809, his wife never had any equitable interest of which she could not have been divested without her concurrence." And again the court said, and its language is just as applicable to this case as it was to that: "Her potential right to dower was, at the date of that conveyance, not only purely technical but initiate only; and springing, as it did from his title, and depending thereon as a mere contingent incident, it can never have become consummate and available, because, when she married him, another person was beneficially seized of the lot, under a contract which, though voidable by him, he was under no sort of obligation to her to avoid, but had a clear right to confirm and was morally bound to effectuate in good faith. Her marital interests were subject to his election on the subject. She had no right to require him to avoid his contract, nor could she avoid it for him or for herself."

This is conclusive of this case, and the judgment must be *affirmed*.

G. G. Gilbert, for appellant. Caldwell & Harwood, for appellee.

SAMUEL B. PHELPS *v.* MARIAM PINKSTON, ET AL.

Specific Performance—Contract of Sale of Real Estate.

The court cannot decree specific performance of a contract of sale of real estate where there is no description of the land in the contract from which the court could ascertain even in what county or state it is situated.

APPEAL FROM MADISON COURT OF COMMON PLEAS.

September 14, 1878.

OPINION BY JUDGE HINES:

In 1864 appellant sold about twenty acres of land to Robert Pinkston, and about 1868 Pinkston sold a portion of the same land to David Howard. No conveyance has been made by the appellant to Pinkston nor by Pinkston to Howard. Howard brought this suit against Pinkston and the appellant, alleging certain payments on the land and seeking a conveyance. Before service of process Pinkston died, and the appellant filed his answer and made it a cross-petition against the widow and children of Pinkston, alleging that he had good title to the land, offering to convey to whom the court might direct, and asking for a sale of the land to pay the remaining pur-

tainly not because she was the wife of Pinkston at the time when the incidents of which she speaks occurred. Information coming to her by reason of the marital relation or confidential communications made by her husband should be excluded. The exception, however, does not raise such an objection.

The exceptions to the depositions of Howard, Neal, Gentry, White and Cole are too general and indefinite, and the court properly overruled them.

Judgment *affirmed* and cause remanded for further proceedings to adjust the equities between the parties, as indicated by the court below, and in conformity to this opinion.

Chenault & Bennett, for appellant. John G. Cole, for appellees.

BAKER BOYD v. A. E. CAMP.

Officer—Escape of Prisoner—Damages.

Only actual damages can be recovered in a suit against an officer for allowing a prisoner to escape.

Nominal Damages.

The court of appeals will not reverse for an error in failing to give nominal damages.

APPEAL FROM JEFFERSON COURT OF COMMON PLEAS.

September 14, 1878.

OPINION BY JUDGE COFER:

The evidence showed without contradiction that Prewitt was insolvent when he was arrested and when he was discharged by the appellee. It is true, as suggested by appellant's counsel, that if he had been detained in jail, friends might have paid appellant's part of the fines to secure his discharge, but such a possibility is too shadowy and uncertain to be a factor for consideration in a judicial inquiry of damages. Under our statute, as well as by the rules of the common law, only actual damages can be recovered in a suit against an officer for an escape. Sec. 5, Chap. 35, General Statutes; *Bernard v. Commonwealth*, 4 Litt. 148.

As no actual damage such as the law can estimate was shown, the appellant had, at most, a right to a merely nominal recovery, and this court has repeatedly decided that it will not reverse for an error in failing to give nominal damages.

The judgment must therefore be *affirmed*.

Little & Slack, for appellant.

WILLIAM WIGGINS v. WILLIAM JOHNSON, ET AL.

Principal and Surety—Agreement to Forbear Without Consent of Sureties.

Any valid agreement by which a creditor agrees to forbear to sue the principal for any appreciable time after the debt falls due, if made without the consent of those bound for the debt as sureties, and with a knowledge that they are sureties, will discharge them.

APPEAL FROM ROBERTSON CIRCUIT COURT.

September 17, 1878.

OPINION BY JUDGE COFER:

The appellant sued the appellees on a note for \$240 dated July 6, 1874, and payable twelve months after date.

Except Johnson, they answered that they were merely sureties in the note, and that the appellant knew that fact, and that in August, 1876, he entered into an agreement with Johnson, the principal, by which Johnson agreed to let the plaintiff have in discharge of the note sued upon (or so much thereof as the hogs would come to) a lot of hogs owned by the defendant, Johnson, at \$— per hundred pounds, to be delivered to the plaintiff by Johnson the following fall, after having been fattened by said Johnson; and in consideration thereof the plaintiff undertook and agreed with Johnson, without their knowledge or consent, to forbear to collect or to attempt to collect the note until after the time for the delivery of the hogs.

To the second paragraph of the answer which contained this defense the appellant demurred; the demurrer was overruled, and a verdict and judgment having been rendered for the sureties this appeal is prosecuted to reverse the judgment.

It is contended that the court erred in overruling the demurrer to the second paragraph of the answer, and in instructing the jury. It is well settled that any valid agreement by which a creditor agrees to forbear to sue the principal for any appreciable time after the debt falls due, if made without the consent of those bound for the debt as sureties, and with a knowledge that they are mere sureties, will discharge them.

But it is contended that the agreement made by the appellant with Johnson was without consideration. If this be correct then of course he was not bound by the agreement, and might have proceeded to collect the debt at any time, notwithstanding his agreement not to

do so, until after the time for the delivery of the hogs. The agreement was that Johnson was to let him have the hogs at the market price, and there was no agreement to pay more than the amount due on the note. But the note was payable in money and the agreement set up was to pay it in hogs.

Part payment before the day or in a particular manner not provided for in the original agreement may amount to a satisfaction of the debt. (Chitty on Contracts, 1102), and a fortiori an agreement to forbear in consideration of an agreement to pay in hogs a debt due in money is also a valid agreement, and having made the agreement the appellant could not have maintained an action on the note until the time agreed upon for the delivery of the hogs had passed; and the answer, therefore, presented a defense to the action and the demurrer was properly overruled.

The instructions of the court conforming to these views and the judgment must be *affirmed*.

C. N. & W. Buckles, for appellant.

Ross & Kennedy, for appellees.

LUCY J. BREWER, ET AL., v. JESSE HILL, ET AL.

Assignment or Mortgage—Rights of Creditors.

The creditors of one who has made a sale, assignment or mortgage in violation of the Act of 1856 have the right to have such a transfer adjudged as a transfer of all the debtor's property for the equal benefit of all of his creditors, provided one or more of them brings an action for that purpose within six months after the instrument is recorded or the property delivered.

Mortgage Set Aside for Fraud.

A creditor who has not procured a judgment and execution and a return of nulla bona cannot maintain a suit to subject property or set aside a mortgage because made in fraud of creditors.

APPEAL FROM HENRY CIRCUIT COURT.

September 17, 1878.

OPINION BY JUDGE COFER:

The act of 1856 gives to the creditors of one who has made a sale, assignment or mortgage in violation of its terms a right to have such sale, assignment or mortgage adjudged to operate as a transfer of all the debtor's property for the equal benefit of all his

creditors, provided some one or more of such creditors shall bring an action for that purpose within six months after the mortgage or transfer is legally lodged for record, or the delivery of the property or effects so transferred.

The appellants did not sue until more than six months after the recording of the mortgage and after the possession of the land had been surrendered to the mortgagees.

The mortgage to Kephart and others was recorded February 19, 1869, and possession of the mortgaged property was surrendered and the equity of redemption was sold, as alleged in the petition, March 5, 1872, and this suit was not commenced until September 8, 1872. Thus it appears on the face of the petition that the suit was not commenced in time to entitle the appellants to relief under the act of 1856, even if the allegations be conceded to be true.

That some or even all of the appellants were infants when the right of action accrued can make no difference. The second section of the act is not a statute of limitation, but an enabling act. It gives a right of action which did not previously exist; and declares that the right must be exercised within a specified time. In such cases the plaintiff must show that he comes within the time allowed. *Wintersmuth & Young v. Pointer & Conway*, 2 Met. 457. The statute does not extend the time in favor of infant plaintiffs, and the court has no power to do so.

The allegation of actual fraud is not sustained by the evidence. There was no error in dismissing the petition as to Moore. He was sued as the surety of Hill in his bond as administrator of Brewer, but none of the covenants contained in the bond were set out in the petition, and it therefore did not contain a statement of facts constituting a cause of action against him.

And we may remark in regard to the charge of actual fraud in the mortgage to Kephart, and the deed to Griffin Kelly, that the appellants not having a return of nulla bona against either Hill or Moore could not maintain a suit to subject the property on the ground that it had been conveyed in fraud of creditors.

The judgment must therefore be *affirmed*.

Wm. Cornwall, for appellants.

Webb & Masterson, Caldwell & Howard, for appellees.

T. E. CRICKETT *v.* PHINEAS D. HAMPTON'S ADM'RS.**Jurisdiction of Court.**

When the subject of an action is mortgaged real estate and a part of it is in the county where the suit was brought, the court has jurisdiction as to the whole although some parcels of the real estate are situated in another county.

APPEAL FROM BUTLER CIRCUIT COURT.

September 19, 1878.

OPINION BY JUDGE COFER:

The subject of this action was the mortgaged property, and as a part of it is situated in Butler county, where the suit was brought, we incline to the opinion that that court had jurisdiction as to the whole, although some district parcels are situated in Logan county. By embracing all in one mortgage the appellant subjected all to the jurisdiction of the courts in either county. Any other construction would be extremely inconvenient in practice, and would subject the parties to unnecessary costs, produce confusion and even result in loss to the parties.

No injustice can result to any one from this construction, and no violence is done to the language of the statute. The petition stated facts constituting a cause of action, and there was no error in overruling the demurrer of the appellant.

The order overruling the motion for a continuance was not excepted to, and for that reason does not, even if erroneous, afford ground for reversing the judgment.

There is no statute directing where the sale of land adjudged to be sold in a proceeding to enforce a mortgage lien shall be made. It is, therefore, the duty of the court to designate the place of sale, and as it does not appear that there was any abuse of discretion in fixing upon Morgantown instead of Russellville, the judgment cannot be reversed on that ground. For aught that appears the former place may have been the most appropriate.

The other assignments of error have been disposed of in what has already been said.

Judgment affirmed.

Judge Hines did not sit.

R. S. Bevier, for appellant. John M. Porter, for appellee.

LYDIA J. STONE v. HENRY STONE.

Dower—Estoppel.

When the land in which a married woman claims dower was sold under decretal sale in an action to which she was a party, and having failed then to assert claims, she is estopped to enforce it now.

APPEAL FROM MERCER COURT OF COMMON PLEAS.

September 19, 1878.

OPINION BY JUDGE HINES:

There is sufficient in the record to sustain the judgment of the lower court.

The evidence strongly tends to show that the land in which appellant claims dower was sold under decretal sale in an action to which she was a party, and having failed then to assert claim she is estopped to enforce it now. The papers in the case in which the decree for sale was rendered were lost, and nothing appears except a decree for sale, confirmation of commissioner's report of sale, and a few other unimportant orders. The absence of an order of consolidation, the failure to describe the land to be sold, and the other defects pointed out by the appellant's counsel, are mere irregularities that might have been corrected by appeal, and do not render the judgment void. *Dugan v. Massey*, 6 Bush 81.

Judgment affirmed.

T. C. Bell, for appellant. No attorney for appellee.

RICHARD FERGUSON, JR., v. CHARLES GODSHAM'S ASSIGNEE, ET AL.

CHARLES GODSHAM'S ASSIGNEE, ET AL., v. W. A. RICHARDSON.

Landlord's Lien—How Lost.

Where property is removed openly from leased premises and without fraudulent intent, and not returned, the landlord's lien is lost as to it unless asserted by a procedure within fifteen days from the time of removal.

Priority of Liens.

The landlord's lien is superior to a mortgage lien when it has not been waived.

APPEAL FROM LOUISVILLE CHANCERY COURT.

September 21, 1878.

OPINION BY JUDGE PRYOR:

By leaving the execution creditor, whose debt has been satisfied, to retain his money, we get rid of some of the seeming trouble in the way of a correct judgment in this case. The sheriff sold the property upon its surrender by the debtor regardless of the lien of the landlord, and Ferguson purchased it the same way. He has satisfied Godsham's debt by voluntarily becoming the purchaser of this property on which the lien existed, and the doctrine of caveat emptor certainly applies as between him and the plaintiff in the execution. The appellant, Ferguson, having paid off more of the debt than he realized out of the property purchased, asked the aid of a court of equity to enforce the collection of his claim by selling other property on the premises subject to the lien of the landlord. Richardson then attached as well as obtained his distress warrant, and although his claim was to be heard in a different tribunal, it was proper that the chancellor should take cognizance of the case in order to determine the priority of liens as between the parties, and the appellant Ferguson cannot object, as he has invoked the aid of the chancellor for that purpose.

It turns out on the hearing that the appellant, Ferguson, has purchased property subject to a lien for one year's rent due and to become due, and that the property, instead of being removed from the rented premises, is left to remain where it was when the purchase was made. The statute will not authorize the conclusion arrived at by this court, under a different statute in the case of *Craddock v. Riddlesbarger*, 2 Dana 205. The statute contemplates an actual removal and provides: "That if such property be removed openly from the leased premises and without fraudulent intent, and not returned, the lien of the landlord shall be lost as to it, unless the same be asserted by proper procedure within fifteen days from the day of removal." Sec. 3, Art. 2, page 604, General Statutes.

So in the case the landlord still retains his lien, and having asserted it the question of priority is alone to be determined; and that the statute recognizes his lien as superior to that of the appellant cannot be doubted. The court in rendering the judgment, instead of requiring Godsham to refund and the appellant, Ferguson, to refund to Godsham, should have adjudged the property purchased under the execution and on the premises, as well as any other property subject to the landlord's lien, to be sold to satisfy the one year's rent due and to become due, and after satisfying the rent to apply the balance to

Ferguson's claim. Ferguson was liable for the whole debt, and had nothing to indemnify him except the property mortgaged, and the mortgage lien and the execution lien were both subordinate to that of Richardson.

If a stranger to the mortgage or the original debt had purchased the property he could not have held it as against the lien of the landlord, and Ferguson's purchase is in effect a purchase subject to the landlord's lien. The judgment as to both Godsham and Ferguson is *reversed*, and cause remanded for further proceedings consistent with this opinion.

As to Godsham his claim for deduction of rent will inure to the benefit of the appellant, Ferguson.

D. M. Rodman, for appellant.

James S. Pirtle, Barnett & Noble, for appellees.

C. U. SHREVE v. T. BOHLSON.

Transfers Void as to Creditors.

A transfer by a debtor of his property without consideration is void as to his then existing liabilities.

Property Exempt from Creditors.

Where articles enumerated in a conveyance made by a debtor without consideration are such as cannot be levied upon by creditors such conveyance is not void as to creditors.

APPEAL FROM LOUISVILLE CHANCERY COURT.

September 21, 1878.

OPINION BY JUDGE COFER:

Every gift, conveyance, assignment, transfer or charge made by a debtor, of or upon any of his estate, without valuable consideration therefor, is void as to all his then existing liabilities. Sec. 2, Art. 1, Chap. 44, Gen. Stat.

That the conveyance by C. U. Shreve to his daughter, and by her to her mother, were without valuable consideration, and that appellee's debts were existing liabilities of C. U. Shreve at the time the conveyances were made, are admitted facts. But it is contended that the appellee knew of the conveyances just referred to, and with such knowledge accepted from Mrs. Shreve and her husband a bill of sale of part of the property conveyed as security for his debt, and

that although the bill of sale was void because of Mrs. Shreve's coverture, and was in fact avoided by her on the ground that appellee is estopped to dispute the validity of her title, Mrs. Shreve cannot avoid the writing because of her coverture and then set it up to estop her adversary. She cannot treat it as invalid for one purpose and valid for another. Being void, it cannot operate as an estoppel on either party.

It is contended that the record shows that the property conveyed and adjudged to be sold was all the household property the debtor had, and that being a housekeeper certain of the articles named were exempt from sale for debt, and that as to them there was no fraud in the transfer, and the order to sell them is erroneous.

If the record showed that the articles enumerated in the conveyance were all the household property owned by the debtor at the time of the conveyance, the conclusion of counsel would be correct, and as to such articles as are exempt from coercive sale by creditors the judgment would be erroneous. But we do not find any such fact stated in any of the pleadings or proved in the record; and for aught that appears, C. U. Shreve may own in addition to that conveyed to Miss Shreve and adjudged to be sold in this case every article exempt by law from execution. Judgment *affirmed*.

James S. Pirtle, for appellant. Clemmons & Willis, for appellee.

FLETCHER DONALDSON, JR., *v.* FIELDING TEMPLEMAN'S ADM'R.

Purchase-Money Lien.

Where the recital in a deed states that each share was conveyed for a named sum, "for which said party of the second part executed his notes," such recital is sufficient to show that the whole purchase-money remained unpaid and to retain a lien.

Innocent Purchaser.

In order to be an innocent purchaser it is not only necessary that the party should buy and obtain legal title without notice of an equity in another, but also that he should have paid the purchase money before receiving such notice.

APPEAL FROM LOUISVILLE CHANCERY COURT.

September 21, 1878.

OPINION BY JUDGE COFER:

The recital in the deed that each share was conveyed for the consideration of \$150 "for which said party of the second part executed

his notes" is sufficient to show that the whole purchase money remained unpaid, and to create, or rather to retain, a lien.

The appellant does not show that he is an innocent purchaser. In order to be an innocent purchaser it is not only necessary that the party should buy and obtain the legal title without notice of an equity in another, but also that he should have paid the purchase money before receiving such notice. *Hardin's Ex'rs v. Harrington*, 11 Bush 367.

The appellant did not allege or prove that he had paid the purchase money or any part of it before notice of appellee's lien, and we need not therefore decide whether, if he had shown himself to be an innocent purchaser, he could have defeated the lien.

The statute of limitation was suspended by the acts set up in the answer for at least 20 months, viz: from March, 1867, to December, 1863; and this, when deducted from the period elapsing from the maturity of the notes to the commencement of this suit, leaves less than 15 years, and so defeats the plea of limitation; and besides, the plea is not sufficient and would not have defeated the action if there had been no suspension of the statute. The allegation is that fifteen years elapsed between the execution of the notes and the bringing of the action, whereas the statute does not begin to run until the maturity of the note. The word maturity should have been used instead of the word execution.

Judgment affirmed.

Reid & Young, for appellant. Reid & Stone, for appellee.

DEMPSEY E. HUGHES v. MARY ANN HUGHES.

Custody of Children.

All things being equal, the father is entitled to the children on a separation from his wife, but the court should make an order that the wife should be permitted to see her son at reasonable periods.

APPEAL FROM GRAVES CIRCUIT COURT.

September 21, 1878.

OPINION BY JUDGE ELLIOTT:

The evidence in this record conduces to the conclusion that after their marriage in 1871 the appellant and appellee lived happily together till they had lived a while at appellant's mother's, from where

they had to remove in consequence of a disagreement between appellee and appellant's mother, which disagreement and ill feeling continued up to this suit.

It seems that in the fall of 1876 appellant and appellee differed about a visit appellant had made to his mother, taking with him his little boy and leaving him there, and there is some evidence that in this or another quarrel between them appellant struck his wife and pulled her hair. The evidence is unbroken that they are both industrious, clever and of high character, and there is really no reason disclosed by this record for their separation except the unwillingness of appellee to go back to and reside with her mother-in-law, a lady with whom she could not agree, and this we think appellant ought not to have requested her to do.

He says he had made arrangements to get a tenement house on his mother's farm, but this was not vacated by former tenant for two months after he went to his mother's, and besides there was no other water on the premises except his mother's cistern, where unpleasant meetings would necessarily have followed between his wife and mother.

Under all the circumstances, we are of opinion that appellant should not have left his wife on her refusal to go to mother's unless he could have had a house and other accommodations which would not have rendered any meeting between his mother and his wife necessary.

The evidence conduces to the conclusion that appellee is a little high tempered and fretful, resulting, likely, from the condition of her health, which is not good, and from this record we conclude that both parties are to blame for the separation. If appellee had displayed less temper and more affection for appellant, the differences and quarrels between them would have been much palliated. We concluded that till appellant can offer appellee a home where she will be free from insult such as may result from a residence with her mother-in-law he should support her, and that the amount fixed by the court is not too large. The court erred, however, in giving the elder of the two children to appellee. The evidence preponderates to the conclusion that the appellant's ability to raise and educate his children is superior to that of his wife. They have two children, the elder a boy about three years old and the other a girl about two years of age.

The appellee should be allowed to keep the girl at present, but the boy should be surrendered to the father.

This court has often decided that, all things being equal, the father is entitled to the children on a separation from his wife, but the court should make an order that appellee should see her son away from his mother's at reasonable periods, and that appellant have the same privilege as to the little daughter.

Wherefore the judgment for alimony is *affirmed*, but the judgment, in so far as it surrenders the son or male child of appellee and appellant into the possession of appellee, is *reversed* and cause remanded for further proceedings consistent with this opinion.

Ed Crossland, W. W. Tice, for appellant.

Boone & Stanfield, for appellee.

E. J. MORENAN'S ADM'R *v.* SILAS L. MORENAN, ET AL.

Contract for Board Between Son and Mother.

To support a contract between a mother and her son who live together, it is sufficient if the one expects to pay and the other to charge for board. It is not necessary, to authorize a recovery, that the price of the board should be agreed upon.

APPEAL FROM HARDIN CIRCUIT COURT.

September 25, 1878.

OPINION BY JUDGE PRYOR:

This case depends alone upon the testimony offered to support the claim of the appellant. The law and facts were submitted to the court and a judgment rendered for the defendant. Yet as it was the intention of the appellee to charge board and his mother to pay board, it authorized the allowance made by the court below. The son-in-law and relatives of the deceased state that the old woman said that the appellee was charging her board, and arbitrators had been called upon at one time to fix the amount to be paid, or to settle this question between the parties. It is not necessary that the price to be paid should be fixed, or the manner in which the contract or agreement is to be fulfilled by either party; it is sufficient to authorize a recovery if the one expects to pay and the other to charge. In this case the appellee had the use of the mother's farm by way of compensation, and the court below may have been liberal in allowing

appellee's set-off; but it was certainly not palpably wrong or against the decided weight of the testimony. Such a verdict by a jury would not be disturbed, and the finding by the court on the facts must be determined in the same way.

Judgment *affirmed*.

S. H. Bush, for appellant. Wilson & Hobson, for appellees.

WILLIAM KINNEY, ET AL., v. JOHN WHEELER, ET AL.

Liens—Husband and Wife.

Where the wife paid her husband's debt out of her own funds and by a sale of her own real estate, and the debt paid was secured by a mortgage lien, and before paying the debt she contracted with her husband's creditor that she was to have his security or lien, her husband assenting thereto, she is entitled to hold such lien.

Homestead Right.

The right to homestead as against a creditor does not depend upon the debtor occupying it at the time the debt is created, but upon the fact that the debt was incurred after June 1, 1866, and the further fact that the debt or liability did not exist at the acquisition of the homestead lands or the erection of the improvements thereon.

Homestead Exemption.

If the judgment debtor is an actual bona fide housekeeper of Kentucky at the time the creditor attempts to make his debt by levy, and the debt was incurred after the passage of the homestead law, and after the debtor has acquired the land and erected the buildings where he resides, he is entitled to the benefit of the law.

APPEAL FROM GREENUP CIRCUIT COURT.

September 26, 1878.

OPINION BY JUDGE ELLIOTT:

On the 2d day of March, 1868, the appellee, John Wheeler, and his wife, Rebecca, executed and acknowledged their deed to Thomas Dugan for about 300 acres of land on Tygert's Creek, Greenup county, for the recited consideration of \$2,500. At the time of this conveyance appellee, John Wheeler, was indebted to appellant, Dulin, in the sum of \$80 and shortly thereafter Wheeler became indebted to appellants, William Kinney & Company, in the sum of about \$300, and to E. F. Dulin in the further sum of \$120.

On the 28th day of February, 1872, for the recited consideration of

\$900, John Wheeler and Rebecca, his wife, joined in a deed to Thomas Dugan, by which they conveyed to him one-half of a lot in Portsmouth, Ohio.

It seems that at the time of the conveyance by Wheeler and wife to Dugan of the tract of land in Greenup county, Dugan executed a writing in which he stated that the deed to him was a mere security for money, and that whenever John Wheeler should pay him the amount he then owed him as well as any advancements thereafter made, he would reconvey the land to Wheeler.

The evidence conduces to prove that in 1872 the amount due Dugan and for which he held a lien on John Wheeler's land amounted to \$900, and to induce the wife of Wheeler to pay this sum he promised her to convey the 300 acres of land which he held by deed from her and her husband to her instead of her husband, and by reason of such promise and agreement Mrs. Wheeler did pay him her debt by conveying to him a house and a part of a lot in Portsmouth, Ohio, at the recited consideration of \$900.

The evidence in this record is clear that the \$900 which Wheeler owed Dugan was paid by Mrs. Wheeler by the conveyance of real property of her own to him in discharge of it and under and by virtue of a contract with Dugan that he would convey to her the land to which he held the absolute deed of herself and husband.

In 1871 appellants, Kinney and Dulin, brought their suits to set aside the deed executed by Wheeler and wife to Dugan, or rather to have it construed only as a security for money, and during the progress of their consolidated suits they had judgments and returns of "no property" on *fi. fas.* for their debts against Wheeler, and by amended pleadings asked for a sale of the 300-acre tract deeded to Dugan in satisfaction of their claims.

To these pleadings Mrs. Wheeler appears, and alleges the payment by her of her own property for the mortgage debt of Dugan of \$900, and asks that she be substituted to his rights. John Wheeler also answered the appellants' pleadings, and stated that he resided on the tract of land that had been deeded to Dugan, and that he was a bona fide housekeeper with a family, and was entitled as against the claims of the appellants to a homestead to the value of \$1,000.

On hearing the court adjudged in Mrs. Wheeler's favor a sale of the tract of land deeded by appellees, Wheeler and wife, to Dugan, or so much as would pay her the \$900 which she had paid to discharge the Dugan mortgage, and out of the remainder the appellee,

John Wheeler, was entitled to a homestead as against the appellants' claims, and to reverse this judgment the case has come here by appeal.

It is certainly very clear that if anybody but Mrs. Wheeler had paid the debt to Dugan, for the security of which he held a mortgage on Wheeler, he would have been substituted to Dugan's equitable lien and could have enforced it for the payment of his claim, and we cannot see why Mrs. Wheeler cannot do the same thing.

She paid her husband's debt out of her own funds, and by a sale of her own real estate, and the debt of her husband that she paid was secured by a mortgage lien, and before she paid the debt she contracted with her husband's creditor that she was to have his security or lien, and to this her husband assented. And we are therefore of opinion that the judgment in her favor was not erroneous. It is insisted, however, that if the court were correct in adjudging in favor of Mrs. Wheeler it erred egregiously in its decision allowing appellee, John Wheeler, a homestead in the premises sought to be sold by the appellants.

It is contended that at the time appellants' debts were contracted the appellee, John Wheeler, was not a resident of this state, let alone the occupant of the premises in dispute, and that, having no right to the homestead at the time he contracted these debts, he could not acquire such rights as against these claims by afterwards moving on to and occupying the premises as a housekeeper.

Sec. 9, Art. 13, Chap. 38, General Statutes, provides "In addition to the personal property exempt from execution by this chapter there shall on all debts or liabilities created or incurred after the first day of June, 1866, be exempt from sale under execution, attachment or judgment, of any court, except to foreclose a mortgage given by the owner of a homestead or for purchase money due therefor, so much land including the dwelling house and appurtenances owned by the debtor as shall not exceed in value one thousand dollars."

The only qualification of this exemption is embraced in the 16th section, which is as follows: "The exemption provided for in this chapter shall apply to all persons of any race or color who are actual bona fide housekeepers of this commonwealth, but shall not apply to sales under execution, attachment or judgment at the suit of creditors if the debt or liability existed prior to the purchase of the land or of the erection of the improvements thereon."

It will therefore be seen that the right to a homestead, as against

a creditor, does not depend upon whether the debtor occupied it as such at the creation of the debt or not, but upon the fact that the debt was created after the 1st of June, 1866, and the further fact that the debt or liability did not exist at the acquisition of the homestead lands or the erection of the improvements thereon.

If the judgment debtor is an actual bona fide housekeeper of this commonwealth at the time the creditor attempts to make his debt by a levy upon his property, and the debt has been created after the passage of the homestead law and after the debtor has acquired the land and erected the building where he resides, he is entitled to the benefit of the law, and his homestead is exempt although he did not reside on the land at the time he incurred the creditor's debt. We have read with care the very able brief of appellants' counsel on this branch of the case, but we see no escape from the conclusions arrived at. But the judgment must be *reversed* as to appellant, Dulin, because \$80 of his debt is evidenced by a note executed in 1865, which was before the passage of the homestead law, and therefore as to that debt appellant's, Dulin's, lien should have been enforced after the satisfaction of that of Mrs. Wheeler; but as to the other claims appellee, Wheeler, is entitled to his homestead exemption.

Wherefore as to appellants, Wm. Kinney & Company, the judgment is *affirmed*, but as to appellant, Dulin, the same is *reversed* for further proceedings consistent with this opinion.

E. F. Dulin, for appellants. T. H. Paynter, for appellees.

GOVEY GARRISON, ET AL., v. VIRGIL GARRISON, ET AL.

Wills—Land Description.

Where by will a farm is devised and described as situated on the Ohio river at the mouth of Cave Run in Jefferson County, Kentucky, and the testator after the execution of the will acquired additional land adjoining, which at the testator's death constituted a part of his farm situated at the mouth of Cave Run, it passed under such devise to the devisee.

Lapsed Legacy.

When by will the testator devised a described lot to a named person and by the same clause of the will bequeathed \$4,000 to the same person, to be used in the erection of a business house on the lot, and after the execution of the will the testator sold and conveyed said lot, it is held that the devisee is entitled to receive the \$4,000 legacy, notwithstanding he will not take the lot.

APPEAL FROM LOUISVILLE CHANCERY COURT.

September 26, 1878.

OPINION BY JUDGE ELLIOTT:

Matthew Garrison died in the city of Louisville in 1863, after having made his last will and testament, which was admitted to probate shortly after his death in the Jefferson County Court.

By his last will he devised and bequeathed to Charity and Sarah Ann, two of his slaves, and the four children of Sarah Ann not only their freedom but all his real and personal estate. He made several specific devises and bequests to different ones of the children of Charity and Sarah Ann. He devised to Mary, the daughter of Charity, his house and lot on the east side of Second street and between Main and Market streets, and the same on which he then and had resided for several years.

The 6th clause of his will is as follows: "I give and bequeath to the above Andrew, Leslie, Govey, William and Lucy Jane my farm, its improvements and appurtenances on the Ohio river at the mouth of Cave Run in Jefferson county, Kentucky, which is the same purchased of Robert J. Ward and others." And by the 4th clause of his will he devised to Virgil, the son of Charity, "The house and lot I own on the west side of 6th Cross street in the city of Louisville." By the 8th clause of his will he says, "I appropriate out of my estate not herein specifically disposed of the sum of four thousand dollars, to be used in erecting and furnishing a business house on the lot of Sixth Cross street hereinbefore devised to the above named Virgil, and the like sum to be used in erecting and furnishing a business house on the lot on Second Cross street, hereinbefore devised to the above named Mary."

After making his will he acquired two additional tracts of land adjoining the farm that he had devised to Andrew, Leslie, etc., the children of his negro slave, Sarah Ann, and it is contended by appellants that this after acquired land passed to them by the 6th clause of the testator's will. By Sec. 16, Chap. 113, General Statutes, it is provided that "a will shall be construed with reference to real and personal estate comprised in it, to speak and take effect as if it had been executed immediately before the death of the testator, unless a contrary intention shall appear by the will."

The farm devised to appellants is described as "situated on the Ohio river at the mouth of Cave Run in Jefferson county, Kentucky,

and is the same purchased of Robert J. Ward and others; and therefore as the after acquired land adjoined and constituted at testator's death a part of the farm situated at the mouth of Cave Run, purchased of Robert J. Ward and others, it would have passed under the 6th clause of the will if it had been made immediately before the testator's death, and as the same effect has to be given to the devise as if made immediately prior to the death of the testator, we are of opinion that appellants are entitled to the two after acquired tracts, by virtue of the 6th clause of the testator's will.

But we are of opinion that the after acquired lot which adjoined the one devised to Mary did not pass to her by virtue of the devise in the 5th clause of the will. The two lots are distinct, with distinct improvements on each, and would not have passed under the description in the devise to Mary had the same been made immediately before the testator's death; nor would the after acquired lot have passed by a deed which only conveyed the house and lot on which Matthew Garrison resided at the making thereof had he owned both when he made the deed.

After the execution of the will in 1856 the testator sold the lot on Sixth street that he had devised to the colored boy, Virgil, and as the devise lapsed in consequence it is contended and so decided by the court below that the \$4,000 bequeathed to Virgil to be used in the erection of a business house on the lot on Sixth street devised to him lapsed also, and that the sale of the lot resulted in the ademption of both the devise and the legacy. In this opinion we cannot concur.

The appropriation, as the testator calls it, is absolute and unconditional, and therefore the right to the money does not depend upon whether the fund appropriated is used in the erection of the house on the lot on Sixth street devised to Virgil or not. The testator merely states how he wished the bequeathed money used, but does not say unless it is so used the bequest shall not take effect. If the construction of the lower court is correct, Virgil would not be entitled to the \$4,000, if it had turned out after the testator's death that he had no title to the Sixth street property. The testator made an absolute bequest of the \$4,000, and Virgil could, after his death and when of age, have elected to take the money instead of having it vested in the house indicated by the testator's will.

We think the court correctly decided what each of the devisees and legatees take under the residuary clause in the will, but for the errors indicated the judgment is *reversed* on the original appeal and

also on the cross appeal of Virgil Garrison, but is *affirmed* on cross appeal of Mary and Nelson Neal.

James S. Pirtle, for appellants. Buford & Twyman, for appellees.

JOSEPH BARCLAY, ET AL., v. MASONIC SAVINGS BANK.

Husband and Wife—Wife's Will.

Where by a will a married woman is given real estate, with power to sell the same or dispose of it by will as if a feme sole, and the statute authorizes married women by will to dispose of her separate estate by deed or will, it is not necessary that the husband should consent to a devise by the wife.

APPEAL FROM LOUISVILLE CHANCERY COURT.

September 26, 1878.

OPINION BY JUDGE PRYOR:

The conveyance by Rose and wife of the 30th of September, 1865, to Mrs. Ronald vests her with full power to dispose of the property in controversy by deed or will. The language of the conveyance is "with full power in the said Ann Elizabeth Ronald to sell the same or dispose of the same by will and testament as if a feme sole." One of the prime objects of the conveyance was to vest her with the right to make such disposition of this property as she saw proper, and her rights to pass the title by last will in such a case was expressly authorized by the statute in force when the devise was made. "A married woman may by will dispose of any estate secured to her separate use by deed or devise, or in the exercise of a written power to make a will." It is not necessary that the husband should consent to a devise by the wife of her separate estate, nor is he to be consulted when she attempts to make such a disposition of property under the exercise of a power conferred on her by the instrument under which she holds it. The husband's consent in neither case is required.

It may be and is doubtless true, as contended by counsel for the appellants, that in cases where the husband is in fact the owner of the property conveyed, or where the consideration paid for it is by reason of the marital relation the money of the husband, the latter may defeat the probate of the will, or have the power canceled; but in this case the wife, in the exercise of the power, devises the estate to the husband. He accepts it by having the will probated, and then

makes a mortgage of the property to secure the payment of his own indebtedness. A complete title was vested in the wife by the conveyance to her with the power to devise it. The devise was made to the husband. He accepts it, and it is now too late for him to question this right of disposition, even if the original consideration for the property moved alone from him, and the right to devise was inserted without his knowledge or consent. Neither the husband nor his children are entitled to the property as against the appellee.

Judgment affirmed.

Lane & Harrison, for appellants. Russell & Helm, for appellee.

M. CUMMINS v. JOHN FITZGERALD.

Appeals from Quarterly Court.

Where a defendant against whom judgment by default was taken in the quarterly court appeals to the circuit court, he may file his answer after the appeal, and the case is to be tried de novo. The fact that no issue was tendered in the quarterly court will not prevent him from filing his answer in the circuit court after appeal.

APPEAL FROM PULASKI CIRCUIT COURT.

September 26, 1878.

OPINION BY JUDGE HINES:

Appellant was sued in the quarterly court on an account for something near \$100, and judgment rendered against him by default. An appeal was taken to the circuit court and filed October 13, 1876. At the March term of the circuit court, being the first term after the appeal, appellant tendered his answer and appellee objected to its being filed, and assigned as grounds that the answer should have been filed and issue found in the quarterly court. The circuit court sustained the objection, and appellant failing to plead further judgment was rendered against him. The answer set forth a good defense to the action, and the court should have permitted it to be filed. Sec. 720 of the Civil Code provides that such appeals shall be tried anew as if no judgment had been rendered.

Judgment *reversed* and cause remanded with directions to permit the answer to be filed, and for further proceedings consistent with this opinion.

Morrow, for appellant.

also on the cross appeal of Virgil Garrison, but is *affirmed* on cross appeal of Mary and Nelson Neal.

James S. Pirtle, for appellants. Buford & Twyman, for appellees.

JOSEPH BARCLAY, ET AL., v. MASONIC SAVINGS BANK.

Husband and Wife—Wife's Will.

Where by a will a married woman is given real estate, with power to sell the same or dispose of it by will as if a feme sole, and the statute authorizes married women by will to dispose of her separate estate by deed or will, it is not necessary that the husband should consent to a devise by the wife.

APPEAL FROM LOUISVILLE CHANCERY COURT.

September 26, 1878.

OPINION BY JUDGE PRYOR:

The conveyance by Rose and wife of the 30th of September, 1865, to Mrs. Ronald vests her with full power to dispose of the property in controversy by deed or will. The language of the conveyance is "with full power in the said Ann Elizabeth Ronald to sell the same or dispose of the same by will and testament as if a feme sole." One of the prime objects of the conveyance was to vest her with the right to make such disposition of this property as she saw proper, and her rights to pass the title by last will in such a case was expressly authorized by the statute in force when the devise was made. "A married woman may by will dispose of any estate secured to her separate use by deed or devise, or in the exercise of a written power to make a will." It is not necessary that the husband should consent to a devise by the wife of her separate estate, nor is he to be consulted when she attempts to make such a disposition of property under the exercise of a power conferred on her by the instrument under which she holds it. The husband's consent in neither case is required.

It may be and is doubtless true, as contended by counsel for the appellants, that in cases where the husband is in fact the owner of the property conveyed, or where the consideration paid for it is by reason of the marital relation the money of the husband, the latter may defeat the probate of the will, or have the power canceled; but in this case the wife, in the exercise of the power, devises the estate to the husband. He accepts it by having the will probated, and then

makes a mortgage of the property to secure the payment of his own indebtedness. A complete title was vested in the wife by the conveyance to her with the power to devise it. The devise was made to the husband. He accepts it, and it is now too late for him to question this right of disposition, even if the original consideration for the property moved alone from him, and the right to devise was inserted without his knowledge or consent. Neither the husband nor his children are entitled to the property as against the appellee.

Judgment affirmed.

Lane & Harrison, for appellants. Russell & Helm, for appellee.

M. CUMMINS v. JOHN FITZGERALD.

Appeals from Quarterly Court.

Where a defendant against whom judgment by default was taken in the quarterly court appeals to the circuit court, he may file his answer after the appeal, and the case is to be tried de novo. The fact that no issue was tendered in the quarterly court will not prevent him from filing his answer in the circuit court after appeal.

APPEAL FROM PULASKI CIRCUIT COURT.

September 26, 1878.

OPINION BY JUDGE HINES:

Appellant was sued in the quarterly court on an account for something near \$100, and judgment rendered against him by default. An appeal was taken to the circuit court and filed October 13, 1876. At the March term of the circuit court, being the first term after the appeal, appellant tendered his answer and appellee objected to its being filed, and assigned as grounds that the answer should have been filed and issue found in the quarterly court. The circuit court sustained the objection, and appellant failing to plead further judgment was rendered against him. The answer set forth a good defense to the action, and the court should have permitted it to be filed. Sec. 720 of the Civil Code provides that such appeals shall be tried anew as if no judgment had been rendered.

Judgment *reversed* and cause remanded with directions to permit the answer to be filed, and for further proceedings consistent with this opinion.

Morrow, for appellant.

W. A. PRINCE *v.* A. Y. MITCHESON'S ADM'R.**Agreement to Pledge Personal Property—Delivery of Possession.**

Where a debtor agrees that his creditor may take personal property to make him safe on his debt, it does not amount to a sale, but is simply an agreement to pledge, and where the agreement is not completed by delivery of the property during the lifetime of the bailor, nothing passes to the bailee, even as between him and the bailor.

APPEAL FROM CALDWELL CIRCUIT COURT.

September 26, 1878.

OPINION BY JUDGE HINES:

This action was brought by the administrators of Mitcheson to recover from Prince the value of certain personal property claimed to have been wrongfully converted by him. Prince answered, setting up title in himself, and the law and facts being submitted to the court, judgment was rendered for the value of the property and an appeal taken.

Only two witnesses speak of the agreement between Mitcheson and Prince, by which appellant insists that the property claimed became his by purchase from Mitcheson. George Daniel says that he was at the house of Mitcheson the day he died and heard him say to appellant "Come here. I want you to take that black filly and those three Berkshire sows, and take them home with you; I owe you \$68 for borrowed money, and you are my surety to Cantrill's executors for thirty odd dollars. You take them and pay the Cantrill note. If I get well and pay you I can take them back, if not you can keep them."

The statement of Mitcheson, as testified to by appellant, was: "Prince, I am owing you some borrowed money and you are my security on a note to the Cantrills for some hogs bought at their sale. I want you to take the black mare and the three Berkshire sows and take them home with you, and make yourself safe in these matters. You can sell them and pay the Cantrill debt and pay yourself what I am owing you."

Mitcheson directed the property to be delivered to appellant that he might take it home with him, but the mare being off the premises at the time, appellant promised to return the Thursday following and take away the property. Mitcheson died the day of this conversation and appellant went on the day promised and got the property.

The court below was of the opinion that the evidence did not es-

tablish a contract of sale by which the property passed without delivery, but only an agreement to pledge, which was not completed by delivery of possession to the pledgee during the life of the pledgor.

Any doubt that might arise as to the nature of the transaction, when the testimony of the appellant alone is considered, is removed by the statements of Daniel. His evidence clearly shows that it did not amount to a sale, but, as the court held, to an agreement to pledge. In any event the evidence tended to that conclusion; and as the law and facts were submitted to the court its findings will not be disturbed.

In the case of chattels bailed under the contract of pledge the property remains in the bailor, and only a special property passes to the bailee; but nothing passes to the bailee, even as between bailor and bailee, unless the agreement is completed by delivery of possession. Judgment affirmed.

J. R. Hewlitt, for appellant. T. J. Morrow, for appellees.

M. J. MAY v. J. L. FERGUSON.

Contract of Employment—Teacher's Contract.

If a teacher is not qualified by reason of not having been examined as the law requires, a contract with him to teach, made by the school trustee, is not binding on the trustee's successor in office.

APPEAL FROM FLOYD CIRCUIT COURT.

September 27, 1878.

OPINION BY JUDGE PRYOR:

There was no obligation on the appellant to comply with the contract made by Porter and the appellee. That a trustee cannot renounce an employment made by his successor may be conceded, but that he is bound by every such contract, even as trustee, cannot be admitted. In this case when the contract of employment was made the appellee was not qualified by reason of his not having been examined as the law requires, and the contract, although conditional, was not binding on a subsequent trustee for that reason. And in addition the trustee, Porter, had obligated himself to furnish fuel, brooms, etc., and created a personal liability that he had no right to impose on his successor. The trustee is a sole corporation, not for the purpose of making him personally responsible, but to enable him

in his official capacity to manage and control the common schools in his district, and if liable it is only as trustee, unless he is guilty of some act that creates a personal responsibility.

Now in this case there was no school room belonging to or under the control of the trustee. He may have thought proper not to rent a room, or may have been without means for that purpose, and certainly had the right to disregard the stipulations of a contract that created a personal liability only on a third party. He was under no obligation to the appellee to rent a house, nor could he have been compelled by the county commissioner to do so. If he neglects his duty he may be removed by the commissioner, and other penalties inflicted as provided by the statute; but no individual liability can be imposed or created upon him by his predecessor in office under a contract to which he is not a party and containing stipulations that as trustee he has the right to disregard. If the former trustee had rented a room and placed the appellee in possession as teacher of the school, the appellant would have been liable as trustee to apply the school fund in that way, but the former trustee had no power to bind his successor to furnish a room, brooms or fuel, or to comply with a contract that at the time it was entered into the appellee himself could not have performed. The demurrer to the petition and the amendment should have been sustained. Neither the pleadings nor proof make out a cause of action. Judgment *reversed* and cause remanded with directions to sustain the demurrer, etc.

Judge Elliott not sitting.

A. Duvall, for appellant. R. Apperson, for appellee.

J. T. COVERT, ET AL., *v.* WILLIAM BETHEL.

Public Sale of Personal Property.

When a sale of personal property is public and competition unrestrained, the knowledge of the party selling the property that the purchaser intends to hold it for another, and to protect it from his creditors, will not enable the purchaser to avoid payment of his note executed for the purchase price of said property.

Waiver of Exemption.

One who stands by and permits his property to be sold without asserting any claim of exemption waives any such right of exemption.

APPEAL FROM HARDIN CIRCUIT COURT.

September 28, 1878.

OPINION BY JUDGE HINES:

Bethel, the appellee, was surety for Beal, one of the appellants, in a bond for rent; and to save Bethel harmless Beal made a written transfer of all his property, consisting of stock, farm products, and household furniture. The last clause of the writing contains this provision: "Saving and reserving so much of the live stock hereby conveyed, as is exempt by law from execution, and so much of the growing crops as may be sufficient to sustain the family of the said A. J. Beal for one year." The property remained in Beal's possession until it was sold by appellant at public outcry, when Beal became the purchaser of one mule and some other property, for which he executed his note to appellee, with Covert as principal and himself as surety. Appellee brought suit on the note, and both Covert and Beal answered, and say that the property for which the note was executed was purchased at the sale for Beal, and because of Beal's insolvency; and to protect it from his creditors the note was executed so as to show that the property belonged to Covert; that Covert never had any interest in it, and never took possession of or exercised any control over it; and further, that appellee knew of this arrangement to defraud the creditors of Beal, and co-operated in carrying out the design. Beal further says that no part of the property was set apart to him by Bethel as was agreed, and he pleads, on this account, a counterclaim. At the conclusion of the trial, the court instructed the jury to find for the plaintiff, and rendered on the finding for the amount claimed by appellee.

At the institution of the action appellee obtained attachments against appellants' property, and the final judgment dismissed the attachment as to Beal and sustained it as to Covert.

Appellants assign for error: 1st. That the court excluded the evidence as to Covert's station in life and pecuniary condition at the time the note was taken. 2nd. In giving a peremptory instruction to find for the plaintiff. 3rd. In overruling motion for a new trial.

Beal's testimony shows that the mule and the hay for which the note was executed was bid in by Covert, and he says: "The arrangement was that Covert should bid in the property for me, the reason being that I was insolvent, had debts leaning over me, and could hold nothing in my name. Plaintiff, Bethel, was a party to and knew all about the arrangement. * * * The mare and furniture mentioned in the assignment was not sold. I did not ask Mr. Bethel to set aside to me any part of the property. My understanding was that

out of the proceeds of the sale such provision should be made. The assignment and the sale were made at my suggestion, in order to cover up my property from my creditors."

The most that the evidence shows in reference to the alleged fraudulent combination is that the appellee knew that the property bought by Covert was intended for Beal, and that it was so bought by Covert instead of Beal in order to protect it from Beal's creditors. It is true that Beal swears that appellee knew all about the arrangement, and was a party to it; but the evidence does not show that he was a party to the fraud attempted to be perpetrated by appellants, any farther than a knowledge of their fraudulent intentions would make him a party. The question then is: when a sale is public and competition unrestrained, will the knowledge of the party selling the property that the purchaser intends to hold it for another, and to protect it from his creditors, enable the purchaser to avoid payment of his note executed for the purchase price? We think not. The appellee parted with his property on the faith of the promise by appellants to pay the amount stipulated in the note. His act of selling could not work injury to the creditors of Beal; that injury could only result from the fraudulent combination between the appellants.

We perceive no error in the ruling of the court by which evidence of the pecuniary condition of Covert, at the time of the execution of the note, was excluded from the jury. That could in no way affect his legal liability. Beal has no right to complain that he was not allowed credit for property not exempt from execution. He does not allege that any of the property was exempt, and if he had, he has waived his right by standing by and permitting the property to be sold without asserting any claim. Beal says that it was his understanding that he was to be paid something out of the proceeds; but the written assignment reserves the property exempt from execution, and not the proceeds, and he does not show any subsequent agreement by which he was to have the proceeds.

The other alleged errors that are argued but not assigned will not be considered.

Judgment affirmed.

Wilson & Hobson, for appellant. ; Hays & Murray, for appellee.

WILLIAM CONRAD, ET AL., *v.* W. G. CONRAD'S EX'RS.**Executor—Duty in Taking Sale Notes.**

It is the duty of an executor in taking sale notes to act with the same prudence and vigilance as is to be expected of a prudent man in the management of his own affairs, and when he thus acts, and from the real and personal property in possession of men signing a sale note, he believes them responsible for the amount of said note, and he accepts it, his inability to collect the note will not prevent him from taking credit for the amount of the note in final settlement.

APPEAL FROM GRANT CIRCUIT COURT.

October 2, 1878.

OPINION BY JUDGE ELLIOTT:

This was suit was brought to settle the estate of William J. Conrad, deceased, and for a proper construction of his will. The will was construed, and on appeal to this court that construction was adjudged to be correct.

On the settlement of the estate the appellees were allowed credit for the debt of J. C. and S. C. Sayres, amounting to \$523.50.

It is contended by appellant, R. I. Blackburn, guardian of William Conrad, Jr., one of the devisees, that a man by the name of Turpin bid off property at the sale of W. G. Conrad's estate to the amount of \$523.50; and the executors at the close of the sale took the note of J. C. Sayres with S. C. Sayres security for the amount so bid by Turpin under some arrangement between the parties.

The only evidence that the Sayres took Turpin's place and executed the note for the property he had purchased is that the notes of Sayres amounted exactly to the sum as the sale bill charges Turpin to be indebted for property purchased by him at the sale. There is no evidence except as before stated that the note executed by J. C. and S. C. Sayres was for the property bid off by Turpin, and there is no evidence except the statement in the sale bill that Turpin purchased any property at the sale.

One of the executors swears that the note in dispute was executed by the Sayres for property bought by J. C. Sayres at the sale, and there is no evidence that such was not the fact. The property for which the note was executed may have been bid off by Turpin and charged to him on the sale bill; but on the execution of the note for the purchase it may have turned out that Turpin bid off the property as the agent of J. C. Sayres, and that J. C. Sayres was the real pur-

chaser; but as we before remarked there is no evidence that Sayres' note was executed for the property purchased by Turpin, and as the executor swears that it was for J. C. Sayres' own debt, the only question for determination is as to whether the executors were entitled to a credit for it in their settlement of the estate.

The evidence authorized the conclusion to which the executors came when they took the note, that J. C. and S. C. Sayres were good for its amount. It was the duty of the executors to act with the same prudence and vigilance as are to be expected of a prudent man in the management of his own affairs. *Moore's Ex'rs v. Beauchamp*, 4 B. Mon. 71.

We are of opinion that if the Sayres were not good, a prudent man would have been authorized, from the real and personal property in their possession as is owned by them, to regard them good for the amount of the note in dispute.

Wherefore the judgment of the court below is *affirmed*.

J. M. Collins, for appellants. E. H. Smith, for appellees.

EDWARD HANKS, ET AL., *v.* DARCUS WRIGHT, ET AL.

Agreement to Convey Real Estate—Will.

The mere intimation by a testator to his relative as to what he intends in the future to do with his estate is not a contract that can be enforced after his death, but an agreement to give land to a relative is a good consideration for his agreeing to return and live near his relative, and when the donee is put in possession and complies with the contract he is entitled to the land.

APPEAL FROM HART CIRCUIT COURT.

October 3, 1878.

OPINION BY JUDGE ELLIOTT:

John Wright resided on a farm in Hart county with his two sisters, and near him resided the appellant, Edward Hanks and his wife and several children till some time before the war, when Hanks and his family removed to the state of Missouri.

John Wright had never married, nor had his two sisters who resided with him. The wife of appellant was John Wright's niece, and for her and her children he cherished a warm affection. Hanks and wife and family emigrated first to Missouri and then to Illinois.

John Wright and Hanks kept up a correspondence by letters after Hanks's removal to the West, and in Wright's letters he pressed Hanks to bring his family back to Hart county and reside near to him. This correspondence continued up to the 18th of December, 1867, when Wright wrote to Edward Hanks and family the following letter :

"Mr. Edward Hanks :

"SIR—You have been promising me to come back for three years and now if you are a coming I want you to come back by the last of February if you intend to come, and if you don't intend to come yourself I want you to send James and George and Ann by the last of February, sixty-eight, and if what I have offered is no inducement to you and your children, don't come; I will make some other arrangements to do with my land and property. Now the land I have for you, I suppose, is worth \$1,000 or \$1,200. My estate is worth from four to five thousand dollars, and I intend it for you and your children if you come back here, and if not, for somebody else."

Shortly after Hanks received this letter he, as requested, came back to his wife's uncle's with his family, and thereupon John Wright put him in possession of what was called the Widow Dickens's farm, to which he removed with his family, where he resided up to the death of his uncle, which occurred in some two or three years thereafter.

On the 20th of January, 1870, John Wright made and executed his last will and testament, which was duly recorded after his death. By this will he devised and bequeathed to his two sisters who resided with him, and to the survivors of them, his entire real and personal estate "except the farm in Green county, Ky., on which Edward Hanks now lives, known as the Widow Dickens's tract, which I desire said Hanks and wife to have the benefit of so long as they may continue thereon. If the said Hanks and wife should leave or vacate, then it immediately to fall back to my two sisters above mentioned."

Some two years after the probate of Wright's will Hanks brought this suit, and claims Wright's entire estate under the agreement evidenced by his letter to Hanks of date December 18, 1867. From that letter it seems that Wright had been making offers to Hanks to induce him to come back, and in that letter he reminds him of the offers made him, and says if not accepted he will make some other arrangements. He then says "the land I have for you is worth \$1,000 or \$1,200."

We think the inference is that he had offered him this land, and therefore he reminded him that he now has it for him if he will come back and reside near him. And as appellant came back as requested, and the testator, Wright, put him in possession of the land promised him on his return, but failed to make him a deed, the court properly adjudged that the land belonged to appellants. And we are of opinion that the court properly adjudged that the balance of the estate did not belong to appellants.

As to the balance of his estate the testator did not offer it to Hanks if he would return to his vicinity, nor did he say he had it for him if he would return, but said "my estate is worth from four to five thousand dollars, and I intend it for you and your children if **you** return back here." This language only expresses the idea that if they came back he intended by his will or otherwise to give it to Hanks and his children. In other words, the letter fairly construed means this: that if Hanks would move back against the last of February, 1868, he should have the farm for so doing, and as further incentive to return he intimated that he intended his other estate for appellants and this is the construction that appellee and Edward Hanks must have given the letter for after the testator's death he became the auctioneer that cried off the personal estate for the devisee Darcus Wright, the other devisee having died, and became the purchaser of property at the sale thereby conceding the title of Darcus Wright under the will of her brother. /

The mere intimation by the testator to his relative as to what he intends in the future to do with his estate does not contain the elements of a contract that can be enforced after his death. There can be no doubt from the letter that the testator intended that the land he offered Hanks should be the consideration for his return to his neighborhood, and the remainder of the letter was a mere intimation of what he expected to do with the balance of his estate.

Wherefore the judgment is *affirmed* on the original and cross-appeals.

Edwards & Seymour, for appellants.

W. H. Cheef, Isaac Woodson, for appellees.

JOHN E. McGRATH, ET AL., v. A. J. KIRKLAND.

Purchase of Property—Lien—Assignment of Lien Notes.

The party who purchases the property and gives the lien to secure his own notes holds the property subject to the lien, although the notes have been assigned and no suit at law instituted on them; but where he assigns the notes of third parties in payment, before the holder can reach the property he must make a good faith effort to collect the notes of the obligor.

APPEAL FROM CALLOWAY CIRCUIT COURT.

October 4, 1878.

OPINION BY JUDGE PRYOR:

The facts of this case bring it directly within the rule established by this court in the case of *Pack v. Carder*, 4 Bush 121, and in *Green v. Cummins*, 14 Bush 174. In the latter case the identical question is settled. When Kirkland assigned these notes to McGrath it was in payment of the land purchased, and although a lien might have been retained in express words it was obligatory on the assignee to prosecute the obligor to insolvency before he could enforce his lien. He will not be allowed to hold the notes because he has a lien. He agreed, in effect, when he took them by the assignment, that he would use diligence to collect, and that he failed to use any in this case is made manifest by the record. The party who purchases the property and gives the lien to secure his own notes would of course hold the property subject to this lien, although his notes had been assigned and no suit at law instituted on them; but the case is different where he assigns the notes of third parties in payment. In such cases before you can reach the property you must make the effort to collect the notes of the obligor.

Judgment affirmed.

W. L. Weathers, for appellants.

CITY OF BOWLING GREEN v. J. H. GRIDER.

Injunction Against City Taxes.

The city has no right to assess and collect taxes on agricultural land, no part of which has been laid off into streets or lots, and where not needed for such purposes and where the owner thereof receives no benefits from any of the city improvements.

Recovering Taxes Paid.

Where taxes are paid neither under a mistake of law or fact, but voluntarily paid without being under duress or coercion, they cannot be recovered back.

APPEAL FROM WARREN CIRCUIT COURT.

October 4, 1878.

OPINION BY JUDGE ELLIOTT:

The city of Bowling Green having assessed about twenty-seven acres of appellee's land for taxation, and its officers having levied on his property for its collection, he brought this suit in equity and obtained a temporary injunction against the collection of the tax, which on final hearing was perpetuated, and hence this appeal.

The appellee is the owner of about 41 acres of land on the southern border of the town of Bowling Green, and the boundary of the town has been extended till it now includes about 27 acres of his land.

We are of opinion that the following facts have been established by the evidence:

First: that the land assessed for taxation lies on the southern border of the town of Bowling Green, and has not been laid off into town lots and is not penetrated by streets or alleys.

Second: that the land is bounded by Chestnut street for over 200 yards, and by Poplar street for over 100 yards, and that on these streets and next to appellee's land are some four or five residences; but that there is no residence or other building on the land assessed for taxation except the one in which the appellee resides.

Third: that appellee resides three-fourths of a mile from the public square of the town of Bowling Green, and still further from its market house, and his premises could receive but little advantage from its water power and none from its gas privileges.

Fourth: that none of appellee's land is needed for streets or alleys, and there is no prospect that at any time in the near future the increase in the city population will require that any part of it shall be laid off into town lots.

Fifth: that appellee's land is used for agricultural and horticultural purposes.

It is contended by the appellee that as his property receives none of the benefits of the municipal government that it should be subject to none of its burdens. All of the authorities agree that the power of taxation is a high governmental power, and that it is the

duty of the courts to keep it strictly within its legal and constitutional limits.

The evidence in this case makes it clear that the population of the city of Bowling Green does not require that any part of the assessed lands shall be laid off into streets, alleys or lots, and that if streets were run through these lands they would not only be useless, but would lead neither to where there was a settled population nor to other streets or highways. The evidence is equally as clear that the appellee is not benefited by the water, gas or other improvements of the city, and the evidence strongly intimates that it will be some time in the future before appellee's land or any part of it will be needed for city lots, streets or alleys. The evidence indicates that there are many lots in the city bordered by streets and alleys upon which no buildings have been erected, and that neither population nor other inconvenience requires an increase of lots or additional streets and alleys in the city.

It is true that the contiguity of appellee's farm to the city has enhanced its value, but this is not sufficient to authorize its taxation, for in *Courtney v. City of Louisville*, 12 Bush 421, it is said by this court that "If the single fact that land is made more valuable by improvements constructed by a municipal government is all that is required to authorize it to tax the land benefited, the area of city taxation would depend upon the energy with which such improvements were pushed into the country rather than upon the area occupied by a city population.

Something more than benefits is necessary to warrant that character of taxation. There must be both benefits, actual or presumed, and a town or city population on or near the land creating a necessity, or, at least, rendering it not unreasonable that the municipal government should be extended over it. But if, considering the location of the property with respect to actual population, it plainly appears that it is not near enough to such population to require municipal government, and the property has not been laid out into lots, and could not be profitably so used, it ought not to be taxed for city or town purposes. Such taxation is palpably unjust, and would be the taking of private property for public use without those corresponding benefits, actual or presumed, which constitute the sole basis of municipal taxation.

As appellant's land has none of it been laid off into streets or lots, and as it is not needed for any such purposes, and as appellant re-

ceives no benefits from any of the city improvements, it seems to us that the city had no right to assess and collect the tax enjoined in this action. If this tax were allowed it would be permitting the city to take appellee's private property to the extent of the tax for the use of the city, without any compensation either in the enjoyment of the advantages of city improvements or otherwise; nor does the property taxed receive any benefits from city improvements, except that its value is enhanced by reason of its proximity to the city.

As the property taxed has received no benefits from the local government it should bear none of its burdens, and this is the doctrine established by this court in *Courtney v. Louisville*, 12 Bush 419; *Louisville & N. R. Co. v. Warren County Court*, 5 Bush 243, and *Marshall v. Donovan*, 10 Bush 681. We conclude therefore that the court did right in perpetuating the appellee's injunction, and we incline to the opinion that it did right in dismissing the bill so far as it sought to recover back the amount of tax that had been paid. It seems that the payment was made neither under a mistake of law nor fact, for appellee inserts a protest in the receipt which evidenced its payment; nor did he pay it to relieve his property from sale as it had not been levied on; and there is not the slightest evidence that he paid it under duress or coercion, and therefore we know of no rule of law that authorizes the money to be recovered back.

Wherefore the judgment is *affirmed* on the original and cross-appeal.

B. F. Proctor, for appellant. Rhodes & Clark, for appellee.

A. CHRIST, ET AL., v. B. F. YEWELL.

Suit on Constable's Bond.

If a constable accepts on a replevin bond a surety who is worthless he thereby fails to perform his duty, for which he and his sureties become liable, but there is no liability on such bond where the security on the replevin bond was good at the time he was taken. His subsequent financial failure or insolvency will not render the officer liable who took the bond.

APPEAL FROM DAVIESS CIRCUIT COURT.

October 5, 1878.

OPINION BY JUDGE ELLIOTT:

This suit involves the correctness of the judgment below on a suit against a constable for taking a replevin bond with insufficient security. It appears that the Christ put two claims in appellee Yewell's hands, who agreed as constable of Daviess county to collect.

Judgments were obtained on the claims, executions issued, and on the 15th of March, 1875, Gasser, the judgment debtor, replevied them, with Geo. S. Luckett as his surety, and it is asserted in this suit that, by reason of Luckett's insolvency when taken on the replevin bond, that the constable and his sureties on his official bond are responsible for the amount of these claims. On the trial of the case the law and facts were by consent submitted to the court, and his judgment is therefore entitled to the same effect as if the same conclusion had been reached by the verdict of a jury; and tested by this rule we are of opinion that the judgment should be affirmed.

It is established by the evidence of several witnesses, as well as Luckett himself, that at the time he replevied the claims in dispute he was the owner of personal property subject to execution to the value of \$1,000 or upwards, and that afterward he sold this property and paid the purchase price to one of his creditors; and the evidence is ample that he not only had visible estate subject to execution, but was considered by the public officers of his county and his neighbors as perfectly good for the amount of the claims in dispute in this appeal.

If Luckett was not good at the time he was taken on the replevin bond, then the taking it was a dereliction of official duty which would render the constable and his sureties liable for the amount of the replevied debt. But (as this court has decided in *Commonwealth v. Thompson*, 3 Dana 301), if the security on the replevin bond was good at the time he was taken, his subsequent financial failure or insolvency would not render the officer who took the bond responsible for the replevied debt.

We are of opinion that the estate owned by the security at the time he executed the bond, as proven in this record, authorized the appellee to take the security, or at least authorized the court to determine in his favor, and therefore the judgment is *affirmed*.

Owen & Ellis, for appellants.

Riley, Joley & Walker, for appellee.

C. T. LANGHORN, ET AL., v. LEBANON & CALVARY TURNPIKE CO.

Married Woman—Acceptance of Deed—Lien for Purchase-Money.

When a married woman accepts a deed of conveyance and holds the title, she cannot bind herself personally for the price, but in such a case equity will declare a lien on the land for the balance of purchase price as the only means of enforcing payment, and where the debt has been assigned the assignee may proceed against the land for payment.

APPEAL FROM MARION CIRCUIT COURT.

October 8, 1878.

OPINION BY JUDGE COFER :

The evidence seems to us to preponderate in favor of the conclusion that as part of the contract for the sale and purchase of the land it was agreed that Mrs. Langhorn should assume the payment of McElroy's subscription for six shares of the appellee's capital stock. True, her husband swears that he assumed to pay for the stock, but in the same connection he also says he purchased the land. McElroy swears that Mrs. Langhorn assumed to pay it, and that she signed her name to the subscription and his was erased, and the appellee's secretary, although he never saw Mrs. Langhorn's name on the book, somehow got the impression that she was interested in the stock, and kept the account in the name of Langhorn and wife; and the fact that the compensation for right of way through the land, which was certainly hers, was applied and accepted as a credit on the subscription tends to sustain the conclusion reached by the circuit judge.

There is nothing in the record to show that a lien was retained on the land to secure the payment of the unpaid purchase money, but we apprehend that this was not necessary. Mrs. Langhorn has accepted, as we infer, and is now holding the title to the land. She could not bind herself personally for the price, and equity will therefore give a lien on the land as the only means of enforcing payment of the purchase money; and as the amount due to the appellee is a part of the purchase money assigned to it and which she agreed to pay, and as payment cannot be enforced except by proceeding against her property, there was no error in adjudging the land to be sold to pay whatever is due to appellee.

But we incline to the opinion that the court erred in rejecting the account pleaded as a set-off. Langhorn proved that Able, while

president of the appellee, directed him to supply Krah! the articles embraced in his account, and agreed that the price should be credited on the stock subscription. True, Able does not appear to have been specially authorized by the directors to make such an agreement, but that was not necessary. He was the chief executive officer of the corporation, and as such had power to make the contract without special authority.

Judgment *reversed*, and case remanded for judgment in conformity with this opinion.

C. S. Hill, for appellants. W. B. Harrison, for appellee.

W. W. TRIMBLE v. C. F. DELLING.

Usury—Renewing of Debt.

As long as a debt exists upon which usury has been paid, although the evidences of such indebtedness have been several times renewed, usury paid at any time may be reclaimed as long as any part of the debt remains unpaid.

APPEAL FROM HARRISON CIRCUIT COURT.

October 8, 1878.

OPINION BY JUDGE PRYOR:

If the position maintained by counsel can be regarded as the law, there is nothing in the record showing that any usury was paid in advance, or at the expiration of each year. The payment of certain sums is alleged to have been made, and after deducting the payments and calculating the interest at six per cent., the amount properly due and owing is reached; nor does the reply allege that the usury was paid, but proceeds by admitting the facts stated in the answer as true, and the payment of interest each year as alleged by the defendant. In the case of *Smith v. Young*, 11 Bush 393, it is stated: "the modern rule is, that as long as the debt exists upon which usury has been paid, although the evidences of such indebtedness have been repeatedly renewed, usury paid at any time may be reclaimed as long as any part of the debt remains unpaid."

The case of *Booker v. Gregory*, 7 B. Mon. 439, is conclusive of this case, and as there said, "the mere fact of calling it (the payment) the usury which had then accrued, did not have the effect to sepa-

rate the transaction or to dissolve the connection and relation it bore to it."

Judgment *affirmed*.

W. W. Trimble, for appellant. A. H. Ward, for appellee.

JOSEPH ROBINSON v. M. J. MOTLEY, ET AL.

Redemption from Judicial Sale.

A person who buys in the land of another at a judicial sale, and who prevents creditors from redeeming it by agreeing to sell enough of the land to repay himself and then turn the balance of it over to the other creditors, cannot be permitted to hold all of the land and thus defeat the claims of the other creditors. Equity will decree a resale of the land to satisfy the claims of creditors after the first purchaser has been repaid.

APPEAL FROM WARREN CIRCUIT COURT.

October 8, 1878.

OPINION BY JUDGE ELLIOTT:

It may be assumed that on the 17th of July, 1877, J. H. Hayes was indebted to the appellee, Thomas, in the sum of \$452.94; to the appellee, White, in the sum of \$616.80; and to the appellee, Motley, in the sum of \$1,337.99, subject to a credit of the same date of \$76, because the court so adjudged in this suit, and there is no appeal by Hayes from that judgment. It may also be assumed that these claims were due to the appellees on the 26th of January, 1874. In December, 1873, J. H. Hayes' land was sold at execution sale and purchased by Wm. Garrison at the price of \$50. Afterward the equity of redemption of the same tract, being the home farm of 304½ acres, was levied on to satisfy various executions by the sheriff of Warren county, and was sold on the 26th of January, 1874, and appellant Robinson became the purchaser at the price of \$1,701. The sale was made for cash in hand, and appellant thereupon paid the \$50 that had been bid by Garrison and the amount bid by himself for the land, making in all \$1,751.

There can be no doubt but that appellant, at the time he purchased, did it at the solicitation of Hayes, the debtor, and to befriend him, and under the belief that Hayes would be able to redeem the land before the expiration of the time for redemption; but there is no positive evidence that appellant bought the land in for

Hayes. The appellant and Hayes both swear that there was no such arrangement.

After appellant's purchase appellees became uneasy about their claims and the financial condition of Hayes, and, they say, obtained an agreement from him that if he found himself unable to redeem the lands purchased by appellant within one month after the expiration of the time allowed for redemption he was to notify appellees, White and Motley, and permit them to redeem for him, so as to make his land liable for their claims and for the \$1,756, which was required to redeem it. Accordingly some time before the expiration of the time for redemption White applied to Hayes to ascertain his ability to redeem the land, and on information of his inability informed him that he could and would raise the money to redeem it, to which Hayes assented and promised to see appellant upon the subject.

White also proves that he took a Mr. Jordan to look at the land, with a view to a purchase, and that Jordan offered Hayes \$6,000 for the land that Robinson had bought under execution sale, and that Hayes refused to take it. White and Motley prove that they raised the money to redeem the land as had been agreed on between them and Hayes, and would have done so but for the delusive promises made to them by both Robinson and Hayes.

They prove that sometime before the expiration of Hayes' right of redemption White had a conversation with appellant, Robinson, and informed him that Hayes was largely indebted to him and Motley and Thomas, and that they were going to pay the amount which he paid on the execution sale of Hayes' land and redeem it. Whereupon Robinson told him that he need not put himself to that trouble, and that he did not intend to keep the land at the price bid, and that he would sell enough of the land to repay himself the amount bid by him and ten per cent. interest, and then the balance should go to pay White and Motley.

White communicated this conversation to Motley, who doubted Robinson's inclination to comply with his promise; and when Robinson was so informed by White he went to Motley and invited him to go home with him, and then and there promised to waive the time for redemption of Hayes' land, and agreed to hold it as a lien for what he had paid for it and ten per cent. interest, and to sell enough for that purpose, and the remainder was to be sold and the proceeds applied to the payment of the claims of the appellees. Rely-

ing on these promises the land was not redeemed within the year, and at its expiration appellant obtained the sheriff's deed, and on application of Motley to redeem he told him he had the sheriff's deed, which he regarded as a good title, and if he doubted his title to "ride in."

We are of opinion that when Robinson bought the land he bought it as the friend of Hayes, and expecting him to redeem, but without any fraudulent purpose to shield it from Hayes's creditors; but we are also of opinion that by his promises to White and Motley he prevented Hayes from redeeming the land through them as had been agreed on, and, as Robinson swears that by a title bond executed in 1875 he attempted to vest the title of the land, after payment to him of what Hayes owed him, in trust for the use of Hayes' children, it may be inferred that after his purchase at the execution sale he may have determined to hold the land as a security for Hayes' indebtedness to him, and, subject to such indebtedness, held it for Hayes' children instead of his creditors. At any rate we are of opinion that Robinson ought not to be permitted to keep this land over the promises made by him and Hayes as against the appellees, and having waived time and agreed that appellees might redeem after the expiration of the year they should be permitted to do so still.

But the court most certainly erred to appellant's prejudice by ignoring his plea for the amount bid by him at the execution sale for the land. There is no denial by the appellees that the sale was a fair one for debts that Hayes actually owed; indeed, the appellee, White, bid the land off, and at his solicitation Robinson took his place as purchaser and paid the money.

There was no fraud in this transaction, and as appellant paid the debts that Hayes actually owed and upon which honest liens had been acquired by execution, we cannot see why Robinson should not have full remuneration by the payment to him of the \$1,756 paid by him on his purchase of the land with ten per cent. interest from the time of payment.

The appellees come into a court of equity asking to be permitted to carry out an agreement to redeem the land, and they must be required to do equity before they can have relief, and the equity to which appellant is entitled is the payment of the amount paid by him on his purchase and ten per cent. interest thereon for one year from the day of his purchase, and this sum should be paid into court, and upon its payment the appellants should have judgment for a sale of

the land to pay the sum required to redeem the land, and also in satisfaction of their judgment against Hayes.

Wherefore the judgment is reversed and cause remanded for further proceedings consistent with this opinion.

J. W. & Geo. R. Gorin, for appellant.

J. H. & J. M. Wilkins, J. H. Rose, for appellees.

W. D. PILLOW v. SAM T. DUNCAN.

Slander—Words Not Actionable.

The following words spoken are held not to be actionable: "By the time Bill Pillow steals a few more board trees from me I will be able to get another ——. I am certain he stole a board tree from me. He had a tree of mine made into boards without my permission. Can you make it out anything but stealing? It is stealing."

Words Actionable in Slander.

To charge one with being a thief is actionable, but where such words are followed by others of an explanatory nature showing that simply a trespass has been committed, such a charge is not slanderous.

APPEAL FROM LOGAN CIRCUIT COURT.

October 8, 1878.

OPINION BY JUDGE HINES:

Appellant instituted two actions for slander in the Logan Circuit Court against appellee. A demurrer to each of the petitions was sustained by the court below, and an appeal taken. On the hearing here both cases were considered together and the judgments of the lower court affirmed.

In the first case the words charged are: "He has stolen a board tree from me up there on the hill, and I am going to have him turned out of the church for it. Bill has stolen a tree from me up there on the hill."

In the second case the words set forth are: "By the time Bill Pillow steals a few more board trees from me I will be able to get another—I am certain he stole a board tree from me. He had a tree of mine made into boards without my permission. Can you make it out anything but stealing? It is stealing."

Counsel for appellant asks a rehearing in the last case. After a careful consideration of the reasons urged and of the authorities

cited, the court is constrained to abide by the opinion already delivered.

In *Clay v. Barkley*, Sneed 67, the words held not actionable were "He killed and salted one of my hogs." In *Porter v. Hughey*, 2 Bibb 232, the words "Hughey's boys did frequently come to our house and hire our negroes and take the dogs and go down into the river bottom and kill cattle no more theirs than mine," were held not to carry with them the imputation of a crime.

The words, "Wilson held Foster's horse whilst Foster knocked defendant off of his horse, put his hand in his pocket, and said the damned old rascal had no money, and he would take his tobacco for his trouble; that one held whilst the other skinned," were held not to import an actual robbery of either money or tobacco. *Russell v. Wilson*, 7 B. Mon. 261.

A majority of this court in *McNamara v. Shannon*, 8 Bush 557, Judge Lindsay dissenting, held that the words, "You are a God-damned thief," were actionable. They universally imputed the crime of larceny, and must have been so understood by those who heard them. But suppose these words had been immediately followed by others, of an explanatory nature, showing that simply a trespass had been committed, would it be contended that the words thus explained were actionable? The case supposed is of the nature of the one under consideration. To say "He stole a board tree from me," if the tree could be the subject of larceny, would be actionable; but when the person speaking explains his meaning by saying "He had a tree of mine made into boards without my permission," it appears that the offense, instead of larceny, is simply a trespass. To designate the offense a larceny does not make it so. There is no charge of stealing the boards.

The petition for rehearing is *overruled*.

R. S. Brevier, for appellant. J. H. Bowden, for appellee.

WILLIAM BETHEL *v.* GEORGE H. VANMETER.

Indemnity Bond and Judicial Sale.

The execution of an indemnity bond before the sale of personal property levied upon and claimed by another than the execution defendant is not a bar to an action by the owner to recover his property, but in addition to his right to recover the bond gives him an additional remedy.

APPEAL FROM HARDIN CIRCUIT COURT.

October 8, 1878.

OPINION BY JUDGE HINES:

Appellant, having an execution against McGabe, caused it to be levied upon a crop of corn, a portion of which was claimed by the appellee. The officer refused to proceed with the sale until appellant had executed a bond of indemnity. At the sale appellant and one Smith purchased the corn, whereupon appellee instituted this action to recover it or its value. Appellant relied upon the execution of the bond as a bar to the action for the recovery of the specific property, and a demurrer being sustained to that portion of the answer a verdict and judgment was rendered for the return of the corn, or in default thereof, for the sum of \$120, its value, with interest and \$15 damages for its retention.

Appellant insists that the execution of the bond mentioned in Secs. 709 and 711 of Myers' Code, being the same as 641 and 642 of the present code, operates to divest the claimant of all title to the property and compel him to resort to the bond for the recovery of damages for the loss.

Such a construction is not authorized by the language of those sections. The provision required to be contained in the bonds by which the purchaser receives a warranty to such an estate or interest as is sold, and the provision expressly releasing the officer from liability for the levy and sale, clearly manifest the intention to give the purchaser a remedy upon the bond in case the property should be taken from him by superior title and to leave the officer without embarrassing and vexatious suits in the discharge of his official duties. A warranty of title to the purchaser would be without meaning unless it were intended to provide for such an emergency.

However, whether or not such is the intention manifested by the law is immaterial, since the owner cannot be divested of his title by any such summary proceeding. Such an act of the legislature would be in palpable violation of the fundamental law, and therefore inoperative. These provisions of the code, instead of attempting to deprive the owner of the property of the right to sue for its specific recovery, gives him an additional remedy upon the bond.

There is no substantial error in admitting testimony or in granting instructions. Wherefore the judgment is *affirmed*.

Wilson & Hobson, for appellant. A. B. Montgomery for appellee.

SAMUEL TAYLOR *v.* COMMONWEALTH.**Criminal Law—Homicide—Self-Defense—Instruction.**

An instruction in a murder case where self-defense is relied upon is correct which in effect says to the jury that a man cannot hunt up his adversary and provoke a difficulty, and then shelter himself from punishment under an assault that he has provoked.

APPEAL FROM MASON CRIMINAL COURT.

October 10, 1878.

OPINION BY JUDGE ELLIOTT :

In December, 1876, Dick Green, a man of color, was killed by the appellant, Samuel Taylor, at the house of a colored man named Alfred Lyons, a few miles below Maysville, Kentucky. The deceased is described by the evidence as almost a giant in physical development and strength, and as an overbearing tyrannical man in disposition.

On the day before he was killed, Green, at a grocery store in Maysville, inquired for the appellant and made threats that he would kill him, and coming up behind him in the rear room of the grocery he drew his knife on him, and as the blow aimed at appellant was descending Green's arm was caught by a bystander and appellant hurried away by the bystanders to save his life. Green appeared almost wild with rage and declared that he would drink the blood of appellant and chew his liver, etc.

The next evening after this meeting at the grocery Green and the appellant went to the house of Lyons. The house is one of three rooms, a kitchen and sitting-room, the latter a story and a half high, with a bedroom above. The sitting-room and kitchen are separated by a covered passage way about ten or eleven feet wide. On the arrival of Green and appellant at the house of Lyons, Green went into the kitchen and appellant into the sitting-room, but shortly thereafter Green came in where appellant was and proposed that they box, etc., which appellant refused ; but Green began to box and wrestle with appellant, who begged him to desist and called out enough, etc., until finally Green struck him and they were ordered out of the house.

They then went out to the dirt road a short distance to the west of Lyons' house, when Green got appellant down and after beating him very severely he cried out enough, when Green let him up ; and there is proof that even after this Green was seen with a rail in pur-

suit of appellant. Appellant, as soon as released from the grasp of his adversary, applied to one or two of the nearest neighbors for a gun or pistol but without success. When he returned to the house of Lyons he found Green still there. It is perhaps proper to state that before the parties left Lyons' house the first time Green had drawn his knife on appellant.

Shortly after appellant's return to the house of Lyons he said he must go home and started, whereupon Green placed himself in the door, knife in hand, and forbid his passage out. Appellant seized a gun, but was disarmed by young Lyons, and at Mrs. Lyons's solicitation Green put up his knife and retired from the door to the fireplace, and appellant passed out on to the porch or passage way and shortly thereafter was heard to say "Sam Taylor is a good man." Whereupon Green says, "What is that you say, Sam Taylor?" and Taylor responded, "Sam Taylor is a mighty good man," and Green immediately rushed toward him in the passage way. The next thing heard by the inmates of the house was the running of water, like a bucket of water had been overturned, and the next thing seen was Green, who came in and said, "He has cut me all to hell," and sunk down and died.

From the blood indications of the conflict the parties had met in the porch or passage way and Green was killed by an ax that had, when last seen before the homicide, been at the wood pile some ten feet from the nearest part of the passage way.

It is contended that the qualification made by the court of the third and fourth instructions were erroneously prejudicial to the prisoner. The third instruction authorized the defendant to kill the deceased, provided the jury believed that deceased had made previous attacks, and from his previous threats the appellant had reasonable grounds to believe that he was then about to receive great bodily harm at the hands of deceased; but at the close of this instruction the court added this qualification which is complained of: "Provided, however, that they believe from the evidence that the defendant was without fault himself in preparing for and seeking an attack from Green;" and a similar qualification was added to the fourth instruction, which was a similar instruction in defendant's favor.

After a careful consideration and scrutiny of the authority we are of the opinion that the qualifications made by the court to the third and fourth instructions of the defendant were proper.

In Wharton on Criminal Law, Sec. 990, it is laid down that

"where a man assaulted has retreated from the assailant, and is secure in his separation from further personal aggression, he has no right to return armed to the scene of conflict and voluntarily engage in a new conflict with the aggressor. If he does so and slays him he is guilty of murder or manslaughter according to the circumstances under which the homicide is committed. If, on receiving such a deadly assault, he suddenly leave the scene of the outrage, procure arms, and in the heat of blood consequent upon the wrong, return and renew the combat and slay his adversary, both being armed, such a homicide would be but manslaughter. For the law, from its sense of and tenderness toward human infirmity, would consider that sufficient time had not elapsed for the blood to cool and reason to resume its empire over the mind smarting under the original wrong.

The proviso to instructions three and four only deprived the defendant of relying on the plea of self-defense if he both prepared himself for and sought an assault from Green at the time Green was killed.

The law does not permit a man to prepare for his enemy and hunt him up and provoke an assault from him in order to kill him, and if the jury believed that after the accused had left the house unpursued by the deceased he deliberately prepared himself with the ax, which he procured from the wood pile, and returned to the passage and provoked an assault which resulted in the killing of deceased, they should not have acquitted him on the ground of self-defense, and they were only so told by the court.

The court only instructed the jury, in effect, that a man cannot hunt up his adversary and provoke a difficulty and then shelter himself from punishment under an assault that he has himself provoked.

We are of opinion that the instructions were as favorable to appellant as he had a right to ask, and the judgment is therefore *affirmed*.

Wadsworth & Sons, for appellant. Moss, for appellee.

JESSE B. McCLANNOHAN v. COMMONWEALTH.

Criminal Law—False Swearing.

The court must have had jurisdiction in the cause in which one has sworn falsely, or he will not be guilty of false swearing. The administration of an oath in a case over which the court has no jurisdiction is like every other part of the proceeding, a mere nullity.

APPEAL FROM PENDLETON CRIMINAL COURT.

October 10, 1878.

OPINION BY JUDGE PRYOR:

The statement contained in the indictment, to the effect that the case in which the accused was sworn was judicially pending in the quarterly court, is not an averment of jurisdiction on the part of the court trying the cause, and this is essential to a conviction. The only distinction or the material difference between an indictment of this sort and one for perjury is that in the latter case the false statement must have been in relation to a fact material to the issue, and in the other any statement, made by a witness in a court having jurisdiction of the case in which the witness is testifying, that is false and known to be so at the time by the witness is an offense within the statute. The administration of an oath in a case over which the court has no jurisdiction is like every other part of the proceeding, a mere nullity, the judge having no more power to administer it than he would on the street where no purpose was to be accomplished by it, or any oath required. Besides, it was competent for the witnesses for the accused to refer to the interview with himself and father that took place in reference to the settlement with Blackaby prior to the trial of the action in the quarterly court, or before the appellant had testified.

The question of intent must control the verdict of the jury. The statements made by the witness in regard to the order may be untrue and still not made falsely by him. He seems to be an ignorant man, not able to read or write, and if Blackaby or any one who prior to the institution of the suit or before he testified had told him that the order was not embraced in the settlement, or that it was not the order of L. B. McClannohan, and the witness, in good faith believing that the order was not received by him or embraced in the settlement with Blackaby, and relying on the truth of the information received by him, made the statement alleged to be false, he is not guilty of false swearing. This inquiry by the accused was made at a time when there seems to have been no other motive than to ascertain the truth as to what was in the settlement with Blackaby, and we see no reason why it should not have gone to the jury.

The judgment of conviction is *reversed* and cause remanded with directions to award a new trial, and for further proceedings consistent with this opinion.

J. H. Fryer, C. Duncan, for appellant. Moss, for appellee.

C. FOSTER, ET AL., *v.* N. SIMMONS' ADM'R.

WESLEY PHELPS, ET AL., *v.* C. FOSTER, ET AL.

Conveyance—Vendor's Lien.

Neither the vendor or his assignee will lose his lien by attempting to coerce payment at law, and although the judgment is satisfied by the execution of the replevin bond, the lien still exists until the debt is actually paid.

Principal and Surety.

A surety on the replevin bond who pays off the lien is entitled to be substituted to the rights of the lien holder as against the principal debtor for whom he paid it.

APPEAL FROM BULLOCK CIRCUIT COURT.

October 12, 1878.

OPINION BY JUDGE PRYOR:

If Foster, as the surety of Samuel, saw that he was in danger of having the debt to pay, and of this he was warned by the issuing of the executions in his own county from time to time, it was his duty to have paid off the execution, and then the money could have been made by him out of the principal. An execution had been returned "no property found" as against the principal; and we think the execution, having been issued in the county where the surety resides and where the judgment was rendered within the seven years, prevented the running of the statute.

As to the appeal of Phelps the questions are more difficult of solution. It is certain that the vendor of the land or his assignee did not lose his lien by attempting to coerce payment at law, and although the judgment is satisfied by the execution of the replevin bond, and the judgment cannot be again reverted to until the debt is actually paid, the lien still exists.

It will not do to say that because the vendor prosecuted a remedy given him by law to collect his claim that he thereby forfeits his lien. It is the law that changed the character of the obligation, and not the vendor; and until his money is paid the mere prosecution of his action at law will not release the lien. See *Clark v. Hunt*, 3 J. J. Marsh. 553. Now in this case the lien existed although the debt has been replevied, and the party paying off the lien as surety in the replevin bond, or at the instance of the debtor, was certainly entitled to be substituted as against the party for whom he paid it. It is

maintained, however, in this case, that although the surety of Foster paid off the debt, he thereby extinguished the lien, and when he comes to ask payment of the principal and to enforce a lien on the same land his principal can claim a homestead, because he says to the surety "your paying the money for me has removed the encumbrances, and I hold it subject to no lien." There is certainly no equity in a rule like this, and the lien still exists. This debt had been paid by the surety prior to the levy of the Simmons execution, and before the mortgage was executed. It was in fact paid by a sale of the land made by the consent of Foster, and with the agreement that he should redeem it. When the execution was levied the sheriff had no interest in it, but became interested when the sale was made.

Here is a lien on the land unsatisfied, and the surety, Funk, liable for the lien debt. A sale of the land on which the lien exists is made by consent under an agreement that the owner might redeem, and the surety and sheriff makes the purchase and pays the money. Such a lien, we think, is prior to that of Simmons and Thompson, and no right to a homestead can be asserted against it. The cases of *Phelps v. Foster* and *Foster v. Simmons* have been heard together. The judgment in the case of *Foster v. Simmons* is affirmed, and in the case of *Phelps v. Foster* is reversed and cause remanded for further proceedings.

J. W. Croon, W. R. Thompson, for Foster.

R. H. Field, for Phelps. R. J. Meyler, for Simmons's Adm'r.

M. R. EVERETT v. THOMAS SIMMS.

Set-Off—Statute of Limitations.

Where a set-off or counter-claim is barred by the statute of limitations, before one can recover upon it he must allege and prove a promise to pay after the running of the statute, and his set-off or counter-claim must be based upon the new promise. There appears no good reason why he may not plead the new promise in a reply, as he is not bound in filing his set-off or counter-claim to anticipate that a plea of the statute of limitations will be interposed.

APPEAL FROM MONTGOMERY CIRCUIT COURT.

October 15, 1878.

OPINION BY JUDGE PRYOR:

If the appellee can recover on his set-off it is by reason of a promise to pay after the running of the statute. His counter claim, or

rather set-off, is not based on the new promise, but alone on the original consideration. The mere statement that he had promised to pay or had a promise to pay within three or four years is insufficient, as the whole pleading shows the action to be on the original promise. Under the new code where the plea is the statute of limitations we see no reason why the plaintiff may not reply by alleging the new promise, as he is not compelled to anticipate such a defense as that of limitation. The agreement to refer the case to arbitrators is not evidence of a promise to pay. The admission that the claim was unpaid does not amount to a promise to pay, and the appellant might have availed himself of the plea even before the arbitrators.

An agreement that one debt should be applied in satisfaction of the other could be shown under a plea of payment but as the pleadings stand in this case we see nothing to prevent the statutes from running. The judgment is *reversed* and cause remanded with directions to permit appellee to amend his pleadings (if he can do so) within a reasonable time, and for further proceedings consistent with this opinion.

Reid & Stone, for appellant. J. J. Cornelison, for appellee.

GEORGE E. JENKINS *v.* COMMONWEALTH.

Criminal Law—Homicide—Murder and Manslaughter—Self-Defense.

If one provokes a combat, or produces the occasion, in order to have a pretext for killing his adversary or doing him great bodily harm, the killing will be murder, no matter to what extremity he may have been reduced in the combat. But if he provokes the combat or produced the occasion without any felonious intent, intending an ordinary battery merely, the final killing in self-defense will be manslaughter only, and not murder.

Evidence—Coolness and Deliberation.

In a charge of murder the coolness and deliberation with which the slayer acted may furnish strong evidence that his act was prompted by malice and was not caused by sudden heat of passion excited by provocation, but the inference to be drawn from his coolness and deliberation under provocation is one of fact for the jury, and they should be left to make it or not as their own judgments may dictate, free from any direction of the court.

APPEAL FROM HENDERSON CIRCUIT COURT.

October 16, 1878.

OPINION BY JUDGE COFER :

Convicted of the murder of Bryan Gilroy and sentenced to be confined in the penitentiary for life, the appellant seeks to reverse the judgment against him. He complains only of alleged errors in the instructions given to the jury.

Of the first and second instructions which defined the crimes of murder and manslaughter no complaint is made. To the third instruction, correctly defining the law of self-defense, the court added this qualification: "But should the jury believe from the evidence that the accused intended to take the life of Gilroy, and cursed and abused him so to induce Gilroy to make an assault upon him to afford a pretext to carry this design into execution, and in pursuance of this design he deliberately killed said Gilroy, then they will find him guilty as charged," etc.

Instruction 4 reads as follows: "If the jury believe from the evidence beyond a reasonable doubt that the defendant began the difficulty with Gilroy, and used insulting language to him for the purpose of inducing Gilroy to attack the defendant, the jury should not acquit the accused on the ground of self-defense, nor reduce the crime from murder to manslaughter, but should find him guilty of murder, even though in the difficulty he may have been assaulted by Gilroy and placed in imminent danger of death or great bodily harm."

The appellant's counsel complain of the modification of instruction three, and of the whole of instruction four. His objection seems to be based upon two grounds. First, that there was no evidence upon which to base either; and, second, that if there was, the court gave undue prominence to that hypothesis by repeating it.

The evidence showed that the appellant went into a grocery and bought a quart of whisky, which he carried out and put in his wagon; he then returned and took off his overcoat and took out his knife and commenced whittling a stick or paring his nails. Presently Gilroy came in, carrying in his hand a green dogwood stick about the size of an ordinary walking cane, and took his position on or against a counter nearly opposite to where the appellant was sitting or leaning, about nine feet from him. After Gilroy came in none of the witnesses seem to have seen appellant's knife until he commenced to cut Gilroy with it.

Soon after Gilroy came in appellant asked him why he had not done that ditching for him as he had promised. Gilroy replied that he had not because he had been sick. Appellant then said, "You

have acted the damned dog with me." Gilroy then replied, "No, I reckon not." Appellant then said, according to one witness, "You are a damned son-of-a-bitch, the length of your stick," and according to another, "You are a damned thieving son-of-a-bitch, the length of your stick."

Gilroy said, "I can't take that," got off the counter and made two steps toward the appellant, holding his stick about one-third of its length from one end, and holding his hand about level with his shoulder, but did not strike with it. The appellant at that instant straightened up and put his right foot forward and cut Gilroy twice with his knife, the blade of which was about four inches long. The first stroke cut Gilroy's arm above the elbow, and he let his stick fall, and the second stroke cut open the left hand. Gilroy turned and ran, crying "murder," the appellant pursuing, and as they went down the steps at the grocery door the appellant cut him again, in the back, and pursued him around a circle of about 75 or 100 yards and cut at him once as they ran, but missed him.

Appellant continued the pursuit until a bystander interfered and stopped him; he then remarked he had done enough and got in his wagon and drove a short distance and stopped; he then returned and asked Kelly if he did not see the big Irishman (meaning Gilroy) strike him with the stick. The witness said he did not; he also asked why they did not stop the bleeding of Gilroy's wounds, and when told it could not be done proposed to go himself and stop it, and also proposed to go for a doctor, and tried to borrow a horse for that purpose. Two witnesses also testified that after appellant had driven his wagon away from the grocery he said he had done just what he wanted and intended to do, after a minute he added, "what else could I have done, the big Irishman come at me with his shillalah?"

As the judgment must be reversed we refrain from commenting on the evidence, merely remarking that it seems to us there was evidence sufficient to warrant the giving of the instructions, if they are otherwise unobjectionable. We perceive no valid objection to the qualification of instruction three.

If one provokes a combat or produces the occasion, in order to have a pretext for killing his adversary or doing him great bodily harm, the killing will be murder, no matter to what extremity he may have been reduced in the combat. But if he provoked the combat or produced the occasion without any felonious intent, intending,

for instance, an ordinary battery merely, the final killing in self-defense will be manslaughter only.

This is stated by the learned authors of cases on self-defense as the result of the authorities, and they cite in support of the first proposition, *Hawkins Pleas of the Crown*, Sec. 18, page 87, and Sec. 26, page 97; *State v. Hill*, 4 Dev. and Batt. 491; *Stewart v. State*, 1 Ohio State 66; *Adams v. State*, 47 Ill. 376, and *Evans v. State*, 44 Miss. 76. In support of the latter proposition they cite *Adams v. State*, 47 Ill. 376. These cases sustain the principles deduced from them, and it seems to us they accord with reason, justice and the spirit of the law.

The qualification of instruction three conforms to this conclusion, but instruction four does not. In that instruction the jury were told that if the appellant used insulting language to the deceased for the purpose of inducing Gilroy to attack him, and he then killed him in resisting the attack thus provoked, he was guilty of murder without reference to the question whether at the time of using the provoking language he designed to kill Gilroy or not. The modification previously given was the whole law on the subject of provocation intended to provoke an attack in order to have a pretext to kill Gilroy, and instruction four should have been so modified as to present the law in case the jury found that the appellant used offensive language to provoke an attack, but without any design to take Gilroy's life.

Counsel also complain that instruction four and the modification of three were in effect comments on the evidence by the court, and that the rule that instructions should be hypothecated upon facts necessary to constitute guilt or to make out a defense, and not upon collateral facts which the evidence tends to prove, was violated. *Coffman v. Commonwealth*, 10 Bush 495; *Brady v. Commonwealth*, 11 Bush 282.

The facts upon which these instructions were hypothecated were not collateral or simple evidence of other facts, but, if found by the jury, called into operation a distinct principle of the law of homicide not previously presented to the jury, and under it constituted guilt.

Instruction five is also complained of. It reads as follows: "The court further says to the jury that in determining whether a homicide is murder or manslaughter the mental condition of the slayer is to be considered, and, whatever the provocation may have been, if the slayer, at the time of the killing, had the command of his passions

and acted with coolness and deliberation, the killing is murder, unless it was done in self-defense."

That the slayer acted with coolness and deliberation may furnish strong evidence that his act was prompted by malice and was not the offspring of a sudden heat of passion excited by the provocation, but the inference to be drawn from his coolness and deliberation under great provocation is one of fact for the jury, and they should be left to make it or not, as their own judgments may dictate, free from any direction of the court.

Judgment *reversed*, and cause remanded for a new trial upon principles not inconsistent with this opinion.

John Young Brown, for appellant. Moss, for appellee.

M. V. R. LONG *v.* SIMPSON & GRECHRIST, ET AL.

Wife's Lease Subject to Claims of Husband's Creditors.

A wife may hold a freehold or an estate of inheritance against her husband's creditors, but a husband is entitled to the wife's chattels, unless they are the separate property of the wife.

APPEAL FROM UNION COURT OF COMMON PLEAS.

October 17, 1878.

OPINION BY JUDGE ELLIOTT:

This is an appeal by Mrs. M. V. R. Long from a judgment of the Union Court of Common Pleas. On September 19, 1874, Mrs. M. A. Carroll leased for and during the period of thirty years to Mrs. M. V. R. Long, the appellant, the coal and mineral privileges of about 400 acres of land lying near Caseysville, Kentucky.

By the contract the appellant was to have the exclusive privilege of mining coal under the surface of said 400 acres of land, and for that purpose to enter on or drive entries into or excavate a part of it, etc. The consideration of the lease seems to have been the development of the coal fields and one-half cent per bushel for each bushel of coal mined on the leased premises. Mrs. Long, the lessee, was without financial ability to work the coal mines and transport the coal to market, and on application to D. A. Brooks & Company they agreed to aid her in the development of the coal fields, provided she would secure their advances by a mortgage, which she agreed to and soon after did; and although the mortgage does not state the amount

secured by it, it does state that the lien is intended to secure the mortgagees for all advances which they thereafter made to her and for money raised by her with them as surety.

By reason of this mortgage Brooks & Company furnished appellant over \$13,000, a large amount of which was spent in driving entries into the mines and making roads therefrom to the river, and other improvements made upon the leased property, and although a large amount of coal was mined and transported to market, at the institution of this action the appellant had failed to return the advances made to her by Brooks & Company by the sum of \$2,400.09.

We are of the opinion that the mortgage secured these advances, and especially as according to the evidence all the fixtures and improvements made on the leased premises and attached in this action were paid for with the money advanced by Brooks & Company. After this suit was brought, appellant employed Brooks & Company to superintend the working of the mines and the transportation and sale of the coal, and pay to her one-half of the net profits and apply the other half to the extinguishment of her indebtedness to them.

But whether the mortgage of Brooks & Company created a lien in their favor for advancements made by them to appellant cannot be a subject of inquiry on this appeal, as they are not parties to it. Nor can the court notice any errors of the court below except those to Mrs. Long's prejudice, as she is the only appellant, and there is no cross-appeal by any of the appellees.

Under the contract between Mrs. Carroll and appellant she claims that the leased premises belong to her, and that they cannot be taken for her husband's debts, this suit being brought by Simpson and others, appellees, on returns of "nulla bona" against B. M. Long, appellant's husband, to subject the leased premises to the payment of their claims.

The evidence indicates that Dr. B. M. Long, the husband of appellee, is insolvent, and has been for many years, and that the appellees are his judgment creditors and have had returns of "no property found" on the *fi. fas.* issued on their judgments. It further indicates that Mrs. Carroll, who was aware of Dr. Long's financial condition, refused to rent her coal lands to him for fear she would not get the money charged by her on the coal mined on her land, and for fear he would be so harrassed by his creditors that the development of the coal fields on her land would be frustrated, if not defeated.

The evidence is clear that there was no fraud in the contract of

lease between Mrs. Carroll and Mrs. Long, and the evidence is equally clear that Dr. Long never paid anything on the contract of lease. He acted as his wife's agent in superintending the working of the mines and transportation of coal therefrom, but, up to the bringing of this suit by Dr. Long's creditors, the working of the leased premises had proved unprofitable, and the lessee found herself in debt some \$2,400; but as her lasting and valuable improvements on the leased premises had been made at a cost of six or seven thousand dollars she was struggling on in hopes that a day of prosperity would yet come, when, instead of being overtaken by prosperity, she was overtaken by the attachments in these suits which seek to treat the leased premises as the property of Dr. Long, her husband, and sell it in payment of his debts.

As there was no fraud or pretense of fraud in the acquisition of this lease by appellant, and as her husband never paid a cent for it, and his labor on it has not amounted to anything like a support for his family, if the estate leased were a freehold or a state of inheritance there can be there can be no doubt that she could hold it against her husband's creditors and all other persons; but as this is a chattel real the husband is entitled to it, unless it is the separate property of the wife, and this lease was not made separate property. But as this lease is in the wife's possession, and as she therefore survived him, she would take it by survivorship, and as Dr. Long's creditors have come into a court of equity to have the lease of the wife appropriated to the husband's debts, such appropriation ought to be made on equitable principles; and those equitable principles require that before the court will take the wife's property not yet reduced to the husband's possession and appropriate it to the discharge of his indebtedness it will see that the wife and children has not been left to starve or freeze, but will settle out of such estate on her sums sufficient to shield her and her children from want and supply them with food, shelter and raiment.

In *Bennett & Wife v. Dillingham*, 2 Dana 436, this court says: "Whenever the husband, or his creditor, calls on the chancellor for his aid, in getting hold of the wife's property, or property claimed in right of the wife, whatever may be the husband's interest in it, the chancellor may withhold any relief until the wife—if she need and desire a provision—shall be provided for." The appellant claims all the property to be hers, and from the pleadings and proof has a large

family with no estate but the leased premises, with an insolvent man for a husband.

As by the consent of her husband the appellant had sublet the leased premises to Brooks & Company, to be worked by them, it was erroneous to take the property out of their possession till their lien debt had been paid, but should have let that contract stand and have made the proper appropriation of the profits which were to be paid to Mrs. Long; and the putting of the property in the hands of a receiver till Brooks & Company are paid may prejudice the rights of appellant, as by her contract with them they may be paid sooner than if the property is worked by a receiver.

Wherefore the judgment is *reversed*, with directions to adjudge that Brooks & Company have a right to work the mines under their contract with appellant till their lien debt is paid, and that the half of their profits to which appellant is entitled under that contract shall be appropriated to the payment of appellant's husband's debts, after making proper provision for appellant, should she so desire.

L. W. Long, for appellant.

D. H. Hughes, Houston, Adair & Morton, for appellees.

EDWARD CUMMINS v. JAMES T. CLARK.

Collection of Tax—Statute of Limitations.

The collection of taxes may be barred by the statute of limitations.

Prevention of Running of the Statute.

The running of the statute of limitations against the collection of taxes may be prevented by relisting delinquent taxes regularly by the proper officer.

October 21, 1878.

OPINION BY JUDGE COFER:

Although the letter of the statute of limitations applies only to causes of action, and although a tax is not a cause of action unless made so by statute, or because there is no other means of enforcing it yet it is a demand which may be enforced and against which it is just as important to provide a means of defense after a great lapse of time after it became collectable as against any other demand.

That the collection of a tax may be barred by the statute of limita-

tions is strongly intimated, if not expressly decided, by this court in *Louisville & N. R. Co. v. Commonwealth*, 1 Bush 250, and it was in terms so decided in *Vaughan's G'd'n v. Burkhardt*, 8 Ky. Opin. 516.

The running of the statute may no doubt be prevented by regularly relisting delinquent taxes with the proper officer, but as this does not appear to have been done in this case, we are of the opinion that the chancellor should have made the injunction perpetual on the ground that the collection of the taxes claimed had been barred by the statute.

This renders it unnecessary that we should consider other questions made in the briefs. Judgment *reversed* and cause remanded with directions to perpetuate the injunction.

Stevenson & O'Hara, for appellant. W. W. Ireland, for appellee.

HENRY MCGEE *v.* COMMONWEALTH.

Criminal Law—Homicide—Dying Declarations.

Where a dying declaration reduced to writing is held inadmissible as evidence, it does not follow that a parol dying declaration is not admissible. When a written declaration is excluded on motion of the accused in a murder trial the ruling will not prevent parol dying declarations otherwise admissible from being admitted as evidence against the accused.

Foundation of Dying Declaration.

When the attending physician of one who has been shot after examination states to his patient that his recovery is impossible and the physician then believes that the patient has himself no hope of recovering at the time he made a declaration as to who shot him, such dying declaration is admissible in evidence.

Voluntary Manslaughter—Instruction.

Where no one saw the wounding that resulted in the death of decedent the accused is entitled to an instruction to the effect that, although the jury may find that the accused killed the deceased not in his necessary self-defense, yet if he did so in sudden heat and passion and without malice, either expressed or implied, they should find him guilty of voluntary manslaughter.

APPEAL FROM ANDERSON CIRCUIT COURT.

October 22, 1878.

OPINION BY JUDGE ELLIOTT:

On the 14th of March, 1877, James Smith, a man of color, was shot and killed near Harrodsburg, Mercer county, Kentucky. He

was shot after dark while on the bridge across Scott's Creek on the Cornishville Turnpike Road, and the evidence all concurs that the night was very dark.

The appellant was tried and convicted of the murder of Smith and sentenced to be hung, which judgment this court reversed, and having been again convicted of the murder and sentenced to confinement in the penitentiary for life he has again appealed to this court.

The errors complained of are the admission of illegal evidence and improper instructions to the jury.

On the first trial of the appellant the appellee read in evidence the written dying declarations of the deceased over appellant's objections, and on the former appeal of this case this court ruled that those written declarations should not have been admitted.

On the return of the case and on this trial the appellee again offered the evidence of those same written declarations, but they were ruled out on appellant's motion, and then the appellee offered in evidence the parol dying declarations of the deceased which were admitted over appellant's objection, and it is now insisted that the deceased having reduced his dying declarations to writing the state is bound by the written evidence, and that no parol dying declaration is admissible.

We are of a different opinion. The written dying declaration that cannot be explained by parol evidence is one that is admissible in evidence against the prisoner, but when the written declaration is inadmissible, and especially when the evidence has been excluded on appellant's motion, it will not stand in the way of parol dying declarations otherwise admissible.

It is, however, contended by appellant that the parol dying declarations of the deceased, proved by Dr. Thompson, which the court permitted to go to the jury, were not admissible and should on his motion have been rejected. The evidence of Dr. D. M. Thompson conduces to prove that he arrived at the bedside of deceased about eight o'clock at night after he was shot, and that he found him very much prostrated from the effects of the wound, and his extremities cold. He says that he told deceased that he was bound to die and that he should be careful not to charge the innocent with the offense of shooting him. The doctor says that although the deceased said nothing about whether he thought he would die or not, he, the doctor was fully impressed with the belief that the deceased had no hope at that time. With this foundation for his statement the doc-

tor was permitted to give evidence of the declarations made by Smith after the doctor's statement to him that he could not recover, and after the evidence by the doctor that he made statements to the same purport after he had expressed the opinion that he was bound to die.

It is contended by the appellant's counsel that if any of Smith's declarations were admissible it was only the one made after he had expressed the belief that he would die, and that it was error to permit declarations of Smith made on the physician's first visit and also on his second visit, as he did not express the opinion that he would die till the third visit, when he told the doctor about what he had declared before as to who had wounded him.

We are of opinion that the preliminary evidence of Dr. Thompson fully authorized the admissibility, from all the declarations made by Smith to him, even if Smith had never positively expressed a belief that he would not recover.

Mr. Greenleaf, in his work on evidence, Vol. I, page 211, speaking of dying declarations, says: "It is essential to the admissibility of these declarations, and is a preliminary fact to be proved by the party offering them in evidence, that they were made under a sense of impending death, but it is not necessary that they should be stated at the time to be so made. It is enough if it satisfactorily appears in any mode that they were made under that sanction, whether it be directly proved by the express language of the declarant or be inferred from his evident danger or the opinion of the medical or other attendants stated to him, or from his conduct or other circumstances of the case, all of which are resorted to in order to ascertain the state of the declarant's mind."

The evidence of the attending physician that he had informed Smith that recovery was impossible, and the belief of the doctor that the deceased had no hope at the time he made the dying declarations, authorized their admission in evidence in this case.

The last declaration that deceased made to his doctor was made, as is admitted, when in extremes, and in that conversation he told him that the other declarations that he had made to him as to who had wounded him were strictly true, and he then repeated substantially what he had said before, and as before stated all the declarations were admissible.

The substance of the dying declarations proved by the doctor was that "Henry McGee shot him; that he saw him and recognized him; that he was at the west end of the bridge about three feet from him

when defendant stepped out from the side of the bridge and shot him;" and the fact that the deceased made these declarations is fully corroborated by several witnesses to whom he made like declarations after he had expressed a belief that he must die.

As to the objections made to instructions we find more difficulty. The court, by its second instruction, said: "If the jury believe from the evidence beyond a reasonable doubt that defendant, Henry McGee, indicted by the name of Henry Lewis, in Mercer county, before April 30, 1877, shot and killed James Smith wilfully and with malice aforethought, when such shooting was not necessary or apparently necessary in his self-defense, they should find him guilty of murder and fix his punishment at death by hanging, or confinement in the penitentiary for life, in their discretion." By the third instruction the jury were told as follows: If, however, the jury believe from the evidence beyond a reasonable doubt that the defendant shot and killed said Smith at the time, place and in the manner above set out in instruction two, then, unless they believe from the evidence at the time of such shooting defendant believed and had reasonable ground to believe that such shooting was necessary to protect himself from immediate impending danger at the hands of deceased, they should find him guilty of voluntary manslaughter and fix his punishment at confinement in the penitentiary not less than two nor more than twenty-one years."

It will be seen that by instruction No. 2 the jury are told that if appellant, with malice aforethought and not in self-defense, shot and killed deceased, he was guilty of murder; and by the third instruction the jury are told if appellant killed deceased at the time, place and in the manner set out in instruction No. 2, then they should find him guilty of manslaughter. So the court required the same character of evidence to convict of voluntary manslaughter that it did of murder, and the jury may have come to the conclusion that even if the defendant had only been guilty of voluntary manslaughter they had a right to convict to the penitentiary for life, as it required the same character of evidence to convict the prisoner of manslaughter that it did of murder, and therefore they had a right to convict of either at their option.

The difficulty, in other words, is that the court gave no instruction defining the offense of voluntary manslaughter at all, and we are of opinion that as nobody saw the wounding that resulted in Smith's death that the prisoner was entitled to an instruction to the

effect that although the jury may find that he killed Smith, and not in his necessary self-defense, yet if he did so in sudden heat and passion and without malice, either expressed or implied, that they should find him guilty of voluntary manslaughter and fix the penalty of such offense.

And for this error the judgment is reversed and cause remanded for further proceedings consistent with this opinion.

Bell, Willis & Thompson, for appellant. Moss, for appellee.

LEVI W. ABSHEAR v. JAMES MONDAY.

Damages from Vicious Horse.

The owner of a vicious horse is required to so confine him as to prevent him from injuring the stock of others; but where the owner is not aware of the vicious habits of his horse he is only bound to use such means as an ordinary prudent man would have used in order to have kept a horse of like temper within his own enclosure, in order to have prevented him from injuring the property of others.

APPEAL FROM ADAIR CIRCUIT COURT.

October 22, 1878.

OPINION BY JUDGE PRYOR:

In a case like this it is immaterial whether the appellant had a fence or not around his premises; it can afford no protection to the appellee.

The proof shows the character of the horse and his vicious habits, at least when outside of his own enclosure, and it was the duty of the appellee to have so confined the horse as would have prevented him from injuring the horses of his neighbors. He is not to be held, however, to the highest degree of diligence if not aware of the vicious habits of the animal. The law in such a case is, did the appellee use such means as an ordinary prudent man would have used in order to have kept a horse of like temper and condition within his own enclosure in order to have prevented him from injuring the property of others?

If it appears, however, that he was a dangerous horse, and that fact is known to the appellee, it was his duty to use extraordinary care in order to provide against his injuring the horses of his neighbors. These two propositions should have been submitted to the

jury. Judgment *reversed* and cause remanded with directions to award a new trial and for further proceedings consistent with this opinion.

T. C. Winfrey, Sallee & Sallee, for appellant.

Alexander, Baker & Reid, Hindman & Sampson, for appellee.

KENTUCKY UNIVERSITY *v.* H. H. WHITE, ET AL.

Corporations Accepting Conveyances.

Property conveyed to a corporation is to be held under the conveyance and charter as if they constituted but one instrument.

Powers of Corporation.

A corporation derives its powers from its charter, and these cannot be enlarged by contract with third persons, although their exercise as to particular parts of corporate property may be limited by such contracts, when to do so will not affect the rights of the public by impairing its ability to accomplish the purposes of its creation.

APPEAL FROM FAYETTE CIRCUIT COURT.

October 22, 1878.

OPINION BY JUDGE COFER:

The position of appellant's counsel, that property conveyed to a corporation is to be held under the conveyance and charter as if they constituted but one instrument, is, we think, correct.

The powers of the corporation are derived from its charter, and these powers cannot be enlarged by contract with third persons, though their exercise as to particular parts of corporate property may be limited by such contracts when such limitations do not affect the rights of the public by impairing the ability of the corporation to accomplish the purposes for which it was created. If, therefore, the appellant's charter, or its charter and the act to establish the Agricultural and Mechanical College, or these and the contracts between the corporation by its agent and those from whom the money to purchase the land and erect the buildings was obtained, inhibits a sale of the property by the corporation, then it cannot defeat that inhibition by the indirection of creating debts and permitting the property to be sold under legal process to satisfy those debts.

There is nothing in either deed imposing any restrictions on the

power of the corporation over its corporate property, and as by Section 3 of the Charter of 1858 it has general power to sell, lease, rent and dispose of any property it may acquire in any way the curators may judge most useful to the interests of the university, there is no limitation on the power of disposition unless it be contained in section 14, of the charter, or in section 3 of the act to create the Agricultural and Mechanical College.

Section 14 applies to property donated, that is, gratuities to the corporation, and makes provision, first, that all such donations, whether by deed, will or otherwise, shall be strictly applied according to the directions of the donor or testator; and second that all moneys thus donated as a permanent endowment fund shall be principal, and only the income therefrom shall be used. But that section has no application to a fund not donated; and as those who paid money on obligations, of which exhibit "A" is a copy, were by its terms to be entitled to certificates of stock entitling them or their representatives and assigns to stock to the amount paid, and that stock entitled the holder to tuition in the university, they are not donors within the meaning of section 14. Nor does the recital in the obligation that the money for which it was given for the purchase of grounds and the erection of buildings for the various departments of the university create a trust or use of such a character as exempts the property purchased with it from the general powers of the corporation conferred by section 3. While it is no doubt true that the desire to advance the cause of education was the prime inducement prompting those who gave their obligations and paid money on them, yet this is not expressed as the consideration, nor is there any attempt to place the property to be purchased under the provisions of the 14th section of the charter.

Section 3 of the act to establish the Agricultural and Mechanical College provides for conducting an experimental or model farm, and for instructing pupils in the art of farming and in the mechanical arts; and for the purpose of carrying on that college the state made certain appropriations, but these were limited to the expenses of conducting the college, and were not for the purchase of lands or the erection of buildings, and gave the state no interest in the corporate property; nor did that act in any way limit the power of the corporation over its own property. We are unable to perceive the grounds upon which it is supposed that act operated to exempt the property of the appellant from sale to satisfy its debts. That it

is an educational corporation does not make it a public, or even quasi-public, corporation.

The public has no other or greater interest in the existence and conduct of the appellant's school than in any other of equal size and merit. It is strictly a private corporation, and those who contributed to its establishment or support placed their contributions under the power and control of the corporation and trusted its preservation and use to them, and if it be lost by being sold to satisfy corporate debts, the loss is one incident to the nature of the enterprise, and must be borne just as in other cases of the kind.

Judgment affirmed.

B. J. Peters, W. C. P. Breckinridge, for appellant.

George W. Dornall, for appellees.

M. B. SWAIN, ET AL., v. MECHANIC'S SAVING ASSOCIATION.

Contract to Pay Interest—Attorney's Fees.

No attorney's fees can be recovered upon, and only interest at ten per cent. before due can be collected on a contract providing, "But in the event of his failure so to pay for two months together he was then to repurchase his stock and pay back to the plaintiff the said sum of \$593.20, with interest, payable monthly from time it was so paid to him, at the rate of 10 per cent. per annum, and in addition thereto one-tenth of one per cent. penalty from the time of failure until paid."

APPEAL FROM DAVIESS CIRCUIT COURT.

October 24, 1878.

OPINION BY JUDGE HINES:

We are of the opinion that the court erred in giving interest on the amount recovered at the rate of ten per cent., from the 2d day of August, 1875, until paid. The stipulation in the contract and set forth in the petition is: "But in the event of his failure so to pay for two months together he was then to repurchase his stock and pay back to the plaintiff the said sum of \$593.20, with interest payable monthly from the time it was so paid to him, at the rate of ten per cent. per annum, and in addition thereto one-tenth of one per cent. penalty from the time of failure until paid." The penalty is to continue until paid, and not the ten per cent. per annum. The right to recover the ten per cent. must depend upon the contract,

and we construe it to be an agreement to pay at that rate until due, and that the institution of the action was an election to treat the debt as due. From the time of the institution of suit the interest should be computed at six per cent. per annum until paid. *Rilling v. Thompson*, 12 Bush 310.

The court erred in allowing an attorney fee. In *Witherspoon v. Musselman*, 14 Bush 214, we have held that such agreements are absolutely void as contrary to the policy of our laws. The judgment should have been for \$593.20, with ten per cent. interest from August 2, 1875, to date of filing suit, subject to a credit of \$27, and the debt to bear interest at six per cent. from the date of the institution of the suit. Judgment *reversed* with directions for further proceedings in conformity to this opinion.

G. W. Ray, for appellants.

A. C. WOOD *v.* J. E. HIGDON, ET AL.

Committee of a Lunatic—Power of Expenditure.

A committee for a lunatic has no power without permission of the court to expend for his ward a greater sum than the profits of his estate.

APPEAL FROM DAVIESS CIRCUIT COURT.

October 26, 1878.

OPINION BY JUDGES COFER AND LINDSAY:

Wood received as committee for the lunatic \$566.46, which he retained about four years. He had no right to expend for the benefit of the lunatic, without permission of the court, a greater sum than the profits of the estate, and there is no proof showing such an emergency as would justify him in expending more and then appealing to the chancellor for the confirmation of such expenditure.

He should be charged with interest at the rate of six per centum per annum, and this should be compounded at the end of each two years, and he evidently expended at least the amount of such interest, and as he has paid over to the new committee \$350, he should be adjudged to pay \$216.46 with six per centum interest from March 8, 1875.

This suit was to settle the accounts of Wood as committee and there is nothing in the petition upon which to charge him on account

of loss resulting from neglect of duty in regard to the collection of the debt on Veech, and therefore if a case was made out by the evidence no judgment could be properly rendered for any loss that may have resulted from his supposed negligence. It was necessary, if the purpose was to charge him for the loss of the Veech debt, to state in the petition facts showing his liability, and as that was not done we forbear to express an opinion whether on the facts appearing he is liable or not.

Judgment *reversed* and cause remanded for a judgment in conformity with this opinion.

Weir & Son, for appellant. Sweeney & Son, for appellees.

SAMUEL TATE v. JOHN S. KENDRICK, ET AL.

Duty of Justices to Provide for County Jail.

It is the duty of the justices to provide a county jail and to determine the necessity for building a new one, and they may be proceeded against and penalties imposed for a dereliction of duty in regard to it.

Levy of Taxes.

Where under a special act a county is authorized to levy a tax of twenty cents on the hundred dollars for a specific purpose, it is not permitted to levy such tax in addition to the general tax for such purpose. The general law and the special act must be construed together to ascertain the legislative intent.

APPEAL FROM PULASKI CIRCUIT COURT.

October 26, 1878.

OPINION BY JUDGE PRYOR:

The justices composing the court of claims had the undoubted right to determine the necessity for building a new jail, and this right is not to be questioned for no other reason than that others may differ with them as to the propriety of such action.

The exercise of such a discretion is not only given the county court, but the justices may be proceeded against and penalties imposed for a dereliction of duty in this regard. They are the exclusive judges of the necessity for making such an expenditure., and besides, in this case the grand jury had not only reported the jail as insufficient, but the circuit judge had taken steps to compel the jus-

tices to discharge their duty. Although the propriety of the order is not to be questioned on the ground of expending, another question has been made in the case entitled to more consideration, and upon which, doubtless, the court below perpetuated the injunction.

The 6th section of Chap. 89, General Statutes, empowers the county court to levy an ad valorem tax of not exceeding fifteen cents on the hundred dollars and apply the proceeds to the rebuilding, finishing or repairing of county buildings. This sum may be imposed as a tax for each year, as is evident from the 8th section of this act, and the right to make the levy applies as well to the erection of new buildings as the repairing of old ones. This levy of fifteen cents was fixed by the legislature as the maximum amount to be imposed for any one year, and when a county court exceeds this sum when ordering a levy such action is void unless sanctioned by some special legislation.

The county court of Pulaski county had asked special legislation on this subject in the year 1873, and was permitted by an enactment applicable alone to that county to levy a tax of twenty cents on the hundred dollars for the erection of public buildings. This was for the erection of a court-house alone, and an increase of the levy was deemed necessary to accomplish that purpose, the levy to be made for several successive years. The legislature said in effect by this local law, the general law applicable to such persons whether in the Revised or General Statutes is so manifest as to permit Pulaski county to impose a tax of twenty cents instead of fifteen cents on the hundred dollars, or such as the general law authorized, but gave no powers to levy a tax of thirty-five cents. The general law in force at that time and the local law must be construed together in order to ascertain the legislative interest, and when this is done there is but little difficulty in reaching a correct conclusion. Pulaski county was not satisfied with the general law on the subject, but wanted the power of the county court enlarged in order that it might impose a tax of twenty instead of fifteen cents.

The law at the time this levy was made was in substance that "county courts have the right to levy an ad valorem tax of fifteen cents, etc., except that of Pulaski county; the county court of that county may for the years 1873, 1874, 1875, etc., levy a tax of twenty cents." If a levy can be made of twenty cents for the court-house, and fifteen cents for the jail, an additional fifteen cents may be levied

for a clerk's office, so you have this burden of taxation increased from fifteen cents per annum to fifty cents.

In order that the citizen might not be burdened with this character of taxation the law-making power has fixed the limit to which the county court may go, and has only enlarged this power with regard to the Pulaski County Court. In this case a levy of twenty cents having been made for erecting public buildings, to be collected in the year 1876, a levy of fifteen cents additional for like purposes could not be made and ordered to be collected the same year, and the sheriff was therefore properly enjoined from proceeding to collect this levy.

Judgment *affirmed*.

T. Z. Munver, J. S. Vanwinkle, for appellants.

GROVER C. KENNEDY v. COMMONWEALTH.

Criminal Law—Homicide—Opinion Evidence.

It is a general rule that non-expert witnesses are not permitted to give their opinions as evidence, but witnesses may testify to the result of their observations made at the time in regard to common appearances or facts, and a condition of things which cannot be reproduced and made palpable to the jury.

APPEAL FROM GARRARD CIRCUIT COURT.

October 29, 1878.

RESPONSE BY JUDGE COFER:

The commonwealth introduced a witness who testified that he was talking to deceased when he (the witness) saw the appellant within a few steps with his pistol leveled; that he (the witness) jumped to one side and aimed to say and believed he did say, "Grover, don't"; and that the appellant fired and the deceased fell. It appeared in evidence that the deceased had lost one eye. The witness stated the position of the parties with respect to objects on the ground and the direction in which the face of the deceased was turned. On cross-examination the witness stated that he did not think the deceased could have seen the appellant at the time he was shot, without turning his head, and that in his opinion the attention of the deceased was attracted by his jumping to one side. The appellant's counsel moved to exclude so much of this statement as expressed what the witness thought, and what his opinion was.

In a petition for a modification of the opinion, counsel called attention to the fact that we have not passed upon this question and ask that we now do so. As these statements were made while the witness was under cross-examination by appellant's counsel, and it does not appear that they were not responsive to questions propounded by them, we ought, perhaps, to presume that they brought out the evidence, and in that case there was no error even if it was incompetent.

But as the case will be tried again it is proper that we should decide whether that part of the evidence that was objected to was competent.

It is not true as a legal proposition that no one but an expert can give an opinion to a jury. From the necessity of the case testimony must occasionally be compounded of fact and opinion. *Steamboat Clipper v. Logan*, 18 Ohio 375, and *Patrick v. Steamboat J. Q. Adams*, 19 Mo. 73. In the recent case of the *Commonwealth v. Sturtivant*, 117 Mass. 122, the Supreme Court of Massachusetts, after an extended and able review of many authorities, reached the conclusion that the exception to the general rule that witnesses cannot give opinions is not limited to experts, but includes the evidence of common observers, testifying to the results of their observation made at the time in regard to common appearances or facts, and a condition of things which cannot be reproduced and made palpable to the jury.

"The competency of this evidence," says the court, "rests upon two necessary conditions: first, that the subject-matter to which the testimony relates cannot be reproduced or described to the jury precisely as it appeared to the witness at the time; and second, that the facts upon which the witness is called to express his opinion, are such as men in general are capable of comprehending and understanding."

The position in which the appellant and the deceased stood to each other at the moment in question cannot be reproduced, nor can it be described to the jury precisely as it appeared to the witness at the time, so as to enable them to form as accurate an opinion as the witness at the time or afterward on reflecting on their respective positions. That men in general are capable of comprehending and understanding when they see the positions of two men with respect to each other whether one can see the other is plain. They may err in their opinions, but are not more likely to do so than in reference

to many facts to which they are allowed to testify without question, and are not nearly so liable to err in forming an opinion from what they saw as a jury would be in forming an opinion as to the fact from the mere statement by the witness as to the position occupied by the parties toward each other.

R. M. & W. O. Bradley, T. P. Hill, W. G. Welch, M. C. Saufley, for appellant.

Moss, C. A. & P. W. Hardin, for appellee.

JOHN ADAMS v. NATHAN WILLIAMS.

Execution from State Court—Bankruptcy.

Where an execution has been issued from a state court and a levy made prior to the filing of a petition in bankruptcy and the property sold after the petition is filed, the lien of the levy and the title of the purchaser is good, especially where no steps were taken by the assignee or the bankrupt to prevent a sale or to have the matter litigated in the bankrupt court.

APPEAL FROM MONTGOMERY CIRCUIT COURT.

October 29, 1878.

OPINION BY JUDGE PRYOR:

The execution had been issued from the state court and levied prior to the filing of the petition in bankruptcy, and the property, after the filing of the petition, was sold and a homestead allotted in accordance with the state law. A lien had been created by the levy of the execution, and there was nothing to prevent the appellant from pursuing a plain remedy pointed out by law for the purpose of making his debt. There were no steps taken by the assignee or the bankrupt to prevent a sale of the land or to have the matter litigated in the bankrupt court. Nor was the appellant compelled to assert his lien in the bankrupt court, for no other reason than a mere notice to him that the petition in bankruptcy was pending. The state court had complete jurisdiction over the parties when the judgment was rendered and the remedy given to make the debt. The debtor had no right to pursue when neither the assignee nor the bankrupt had taken any steps to have the lien enforced elsewhere. The sheriff in this case had seized the property, and although the title had passed to the assignee, he held it subject to that lien, and it was the duty of

the sheriff to sell it unless there had been some proceeding in the bankrupt court to restrain him. The sheriff, in order to sell, was required to set apart a homestead as provided by law. This was done, and the remainder of the tract sold passing the title to the purchaser. Bump on Bankruptcy 276; *Marshall v. Knox*, 8 Nat. B. R. 97; *Wilson v. Childs*, 8 Nat. B. R. 527.

The case cited by counsel is where the creditor had proven his claim and thereby submitted his case to the jurisdiction of the bankrupt court. If the sheriff, as has been repeatedly decided, must go on and make the debt, or sell under the process from the state court, he must enforce the lien created by the execution as required by law. That is, he must treat the defendant as a housekeeper and entitled to the exemption, have the same set apart, and sell the balance, this being subject to the execution; and under such a sale the purchaser acquires a title.

Judgment *reversed* and cause remanded with directions to award a new trial and for further proceedings consistent with this opinion.

Apperson & Reid, for appellants. J. J. Cornelison, for appellee.

LEE & FOSTER v. W. H. WALKER'S ADM'RS.

Mortgage Foreclosure—Description of Debt.

Where it is stipulated in a mortgage that it is to secure certain described debts, and in a suit to foreclose it there is no allegation of a mistake, it cannot be construed to secure other indebtedness than that described therein.

Mortgage Lien as Against Purchasers.

Where it is stated in a mortgage that it is given to secure named debts and to secure other indebtedness not described, such a mortgage will not create a lien as against purchasers of the property described in the mortgage.

APPEAL FROM OWEN CIRCUIT COURT.

October 29, 1878.

OPINION BY JUDGE PRYOR:

This case is unlike the case of *Berryman v. Brumback* in this: Berryman filed the petition alleging that the object of the appellee, Walker, was to secure himself in goods thereafter sold or to be sold the mortgagee, and made no question except one of fraud. Walker

answered and said that advances had been made for more than the amount of the debt, both parties conceding that to that extent the mortgage was good. In this case the mortgagee files his bill to foreclose, and alleges that the mortgage was not given to secure the payment of the \$500 loaned money, but was in fact executed to secure the debts for which the notes were executed. There is no allegation of a mistake, but the plain statement that the mortgage was intended to secure other debts than those mentioned in the mortgage.

How such a mortgage can affect a purchase with or without notice we cannot well perceive. The tobacco is in possession of the debtor, and the creditor is notified that the mortgage was not intended to secure that debt but some other debts differing in amount and created at a different time. Now to make a mortgage effectual its terms and conditions must show that it is given to secure the debt therein mentioned, either due or to become due, or if for goods thereafter to be purchased, the mortgage must show this fact; and the bare statement in the writing that the writing was given for other purposes or to secure other debts than those mentioned will not create a lien as against purchasers. In the case of *Berryman v. Brumback* it was a contest between creditors. The equities of the parties were being asserted; the one had parted with a portion of his goods on the faith of the pledge and the other had parted with nothing.

In this case the purchaser is affected alone by the record. He has parted with his money and become the owner of the property, and the concession that the mortgage was not intended to secure the debt mentioned is conclusive against the appellee. In other words, the mortgagee cannot assert a lien as against a purchaser who pays his money when he admits that the mortgage was not given to secure the debt it represents. The mortgage in this case was given doubtless in good faith, but it was not executed to secure the claim mentioned. The judgment is therefore *reversed* and cause remanded with directions to dismiss the petition as against the appellants, Lee & Foster.

Lillard & Hallam, for appellant.

A. P. Grover, H. P. Montgomery, for appellees.

JAMES COLCORED *v.* J. G. ARNOLD'S COMMITTEE.**Contract to Pay Money—Interest.**

Where a contract provides for the payment of interest until maturity, there is no agreement to pay interest annually; and after the maturity of an obligation to pay money it will only bear legal interest unless there is an express agreement.

APPEAL FROM PENDLETON CIRCUIT COURT.

October 30, 1878.

RESPONSE BY JUDGE COFER:

By the terms of the contract appellant was to pay \$500 for 200 acres of land in four equal annual installments, with interest payable annually. According to the case of *Talliaferro's Ex'rs v. King's Ad'rs and Heirs*, 9 Dana 331, each installment of interest should bear interest from the time when it was stipulated to be paid, so long as it remains unpaid.

The contract only provides, however, for the payment of interest until maturity. In other words, there is no stipulation in it to pay interest until the principal is paid, and consequently there is no agreement to pay interest annually on any part of the debt after such part became due, and we have decided that after the maturity of an obligation to pay money it will only bear legal interest unless there is an express agreement. The rate stipulated to be paid up to that time shall continue until the debt is paid. *Rilling v. Thompson*, 12 Bush 310, and for like reasons, when a contract, such as in this case, or in *Talliaferro's Ex'rs v. King's Adm'rs and Heirs*, matures as to the whole or any part of the debt the portion due ceases to bear interest under the contract, and every running interest at the legal rate can be recovered. True, no such distinction is taken in the *Talliaferro* case, but there is nothing which necessarily excludes it, and as it is established by the subsequent case, there is no reason why it should not be made here.

January 25, 1845, the end of one year from the date of the contract, there was due thereon \$155, \$125 of the principal debt, and \$30 for one year's interest on the whole debt; January 25, 1846, there was due \$149; January 25, 1847, \$143, and January 25, 1849, \$131. Each of these sums should bear interest from the day when it fell due until paid, or interest may be calculated up to the date of the payment, and judgment be rendered for the whole sum of principal and interest to bear interest from that time until paid.

The appellant testified in his deposition given in October, 1875, that he had been in possession of the "slip" for twenty-three years, which would make the time of his entering into possession October, 1852. He should therefore be charged with interest on the price agreed to be paid for that parcel (\$2.50 per acre) from that time.

To the extent indicated herein the opinion is modified, and as to all other matters the petitions are overruled.

C. H. Lee, W. W. Trimble, for appellant.

Stevenson & O'Hara, for appellee.

J. M. HIEATT, ET AL. v. M. H. HIEATT.

Consideration for Co-Obligor.

When the owner of a note against the father agrees not to sue for a reasonable time if a son will sign the note as co-obligor with his father, the giving of time to the father is a sufficient consideration for the son's becoming obligated, and he is bound whether the father knew his son had signed the note or not.

APPEAL FROM SHELBY CIRCUIT COURT.

October 31, 1878.

OPINION BY JUDGE ELLIOTT:

In December, 1873, M. P. Hieatt executed his note to the appellants for \$325 due the following March. Sometime after the note became due appellant, J. M. Hieatt, informed the appellee, who was the son of M. P. Hieatt, that unless he would sign his name to the note sued on as his father's security that he would bring suit on the note, but if he would become surety on the note, that appellants would give indulgence to M. P. Hieatt for a seasonable time for payment of the note. The appellee accepted the terms offered by the obligees and signed the note as requested and after indulging M. P. Hieatt about two years thereafter, and the failure of either of the obligors to pay the note, the appellants brought this suit.

Appellee denied the right of appellants to recover, because he says that his promise to go his father's security was without his father's consent and was not founded upon a sufficient consideration.

The evidence indicates that appellants agreed to wait a reasonable time for payment of the note in dispute if appellee would sign it, and that this agreement was made after the maturity of the note

and without the knowledge of the original obligor M. P. Hieatt. We are of opinion, however, if the appellants held the note of M. P. Hieatt, which was past due, and if in consideration of an agreement to wait a reasonable time for payment made by the obligees with M. H. Hieatt, he went on the note as a co-obligor, and the appellants complied with the terms of their agreement to give time, their cause of action is complete against appellee; and the validity of the contract does not depend upon the consent of M. P. Hieatt to the agreement by which appellee became bound for the note, for if appellee went on the note in pursuance of a contract founded on a valid consideration he cannot dispute its obligatory force or deny that he is a co-obligor or surety of his father, even if the latter refused his assent. The case of Pulliam & Payne v. Wilpers, 8 Dana 98, is very nearly like this one. There the principal obligor knew nothing of the contract by which the surety signed the note till it had been done, and when informed of it expressed dissatisfaction.

It is true that the principal obligor should have assented or confirmed the act as intimated in that opinion, but it is a mere intimation, the case being decided on a different ground. We take it that if appellants and appellee made a contract founded upon a sufficient consideration, by which appellee agreed to sign and did sign his name to his father's promissory note with the expressed intention of being bound thereon, then the appellee cannot deny the obligatory force of the instrument because the other obligor says it was signed by appellee without his consent.

Even if the consent of M. P. Hieatt had been necessary to the obligatory force of the instrument against appellee, the question, as to whether the credit of the two years which resulted from this agreement and other evidence in the record amounted to acquiescence in and a confirmation by M. P. Hieatt of the contract sued on should have been submitted to the jury.

But as the contract entered into by appellee was not unlawful or against public policy, and was founded on a sufficient consideration and its terms complied with by the appellants, we fail to see why appellee is not bound on it as he agreed to be bound, whether his father assented to it or not. As the rulings of the court below are inconsistent with this opinion the judgment is *reversed* and cause remanded for further proceedings not inconsistent with this opinion.

Bullock & Beckham, for appellants.

Caldwell & Harwood, for appellee.

HENDERSON NATIONAL BANK v. LAGOW.

Consideration of Contract.

The maker of a note has a right to give and the holder to accept, additional security for a note given for a pre-existing debt for which the maker was bound, and his desire to further secure the debt is a sufficient consideration to uphold the executed contract of assignment.

Consideration for Assignment of Note.

The statute has not made the inadequacy of the consideration, or the absence of any consideration, for the assignment a valid defense to an action by an assignee, however the circumstances may affect the rights of the maker of the note and of the assignee, when the former sets up a defense or set-off arising after notice.

Defense or Set-Off in Equity.

A party seeking to make a defense or set-off in equity beyond that given by the statute must show affirmatively the existence of the facts necessary to raise the equity.

APPEAL FROM HENDERSON COURT OF COMMON PLEAS.

October 31, 1878.

OPINION BY JUDGE COFER:

Although the bank gave no new consideration for the assignment of the notes, Stapp had a right to give, and the bank to accept, additional security for the pre-existing debt for which Stapp was bound; and Stapp's desire to further secure the debt was a sufficient consideration to uphold the executed contract of assignment, and to vest the title to and beneficial interest in the notes in the bank. Being thus vested with the title to the notes, the bank might maintain an action on them against the maker, and, so far as mere legal defenses are concerned, its right to recover cannot be in any wise affected by the consideration on which the assignments to it were based.

The criterion by which to test a legal defense against an assignee is to suppose the note due and an action brought by the assignor at the time the maker received notice of the assignment, and then to inquire whether the matter relied on existed and could have been pleaded to that action. If it could not, then it constitutes no valid legal defense or set-off against the assignee, and the right to make it is not reversed to the maker by the statute, which only provides for such as existed, and could have been used against the assignor before notice of the assignment. *Walker v. McKay*, 2 Met. 294.

Applying this test to the defense pleaded in this case, it must be held not to be valid as a legal defense. It does not come within the statutory reservation. It did not exist, and could not have been used, against the assignor before notice of the assignment, for the debt to Holloway's executor had not then been paid, nor was it then due. If the notes sued on by the bank had been due and sued on by Stapp, and Lagow had been called on to plead the suit on the day on which he received notice of their assignment, the existence of Holloway's lien would not of itself have constituted a defense, either legal or equitable. Lagow, therefore, had no defense against the notes before he received notice of the assignment, and if he now has a defense it must have come into existence since that time, and is independent of the statute.

That the bank paid no new consideration for the assignment does not affect the question we are now considering. We have seen that it held the notes under an assignment valid between assignor and assignee, and against a maker who had no defense or set-off before notice of the assignment, which he could have made available against the assignor. It is immaterial upon what consideration the assignment may have been made; the bank is none the less an assignee invested with the title to the notes and a right to sue on them in its own name. The statute has not made the inadequacy of the consideration, or even the absence of any consideration at all, for the assignment a valid defense to an action by an assignee, however these circumstances may affect the rights of the maker of the note and of the assignee when the former comes to set up a defense or set-off, arising after notice.

But although the statute does not allow a defense or set-off, as existing and capable of being used against the assignor before notice of the assignment, to be used against the assignee, yet such defenses and set-offs may, nevertheless, be sometimes allowed upon equitable grounds independent of the statute. But a party seeking to make a defense or set-off in equity beyond that given by the statute must show affirmatively the existence of the facts necessary to raise the equity.

The bank parted with nothing, and Stapp received nothing for the assignment of the notes, and Lagow having, as we conclude from the evidence, paid the note due July 28, 1875, before notice of the assignment of the last two notes to the bank, and having been subsequently compelled to pay the debt to Holloway's executor, he

was thus, without fault on his part, placed in a position in which, if compelled to pay the two notes to the bank, he will be compelled to pay ten or twelve hundred dollars more than he agreed to pay, and to look to Stapp for reimbursement. Even though Stapp be solvent, Lagow will be placed in a worse condition than he would have occupied if his notes had not been assigned. But if the bank is not permitted to collect the amount of the note paid to Stapp in ignorance of the assignment, it will be in no worse condition than it was before it received the notes. It seems, therefore, not to be equitable to compel him to pay both notes to the bank, but he should at most only be required to pay the excess of the last three notes over the amount paid to extinguish Holloway's lien.

But his counsel contend that, having paid the note maturing January 28, 1875, to Stapp, and having also paid the Holloway lien, and as these, with former payments, exceed the price he agreed to pay for the property, he should not be required to pay anything to the bank. This is claimed on the ground that the bank paid nothing for the notes, and consequently is not a holder for value, and they cite *Lee's Adm'r v. Smead*, 1 Met. 28, and *Bay v. Coddington*, 5 Johnson's Ch. (N. Y.) 54, in support of their position.

Those cases are not like this. In the former the contest was between one who had assigned a note for collection, and a person who had received it from the assignee of the owner as collateral security for a pre-existing debt; and all that was decided was that the holder's title could not be upheld against the real owner on the ground that the note had been received for value in the regular course of business, and this is substantially the same as *Bay v. Coddington*.

But here Lagow owed both notes, and he also owed another to Stapp; and having already received notice of the assignment, and being then apprised of the existence of Holloway's lien, and knowing that if he paid the remaining note to Stapp, and should thereafter be compelled to pay that lien, nothing would remain for the bank, he paid to Stapp before maturity the note still held by him. Did he in this violate the rights of the bank?

At the time Lagow paid the note maturing January 28, 1875, to Stapp the debt to Holloway's executor was due, and Lagow might have paid the amount of that note to the executor and would have had a valid defense if sued by Stapp. He therefore had it in his power, by taking that course, to protect both himself and the bank to that extent.

It does not appear that Stapp was then insolvent, or that Lagow had any reason to suppose that he would not pay the Holloway debt; yet, as he had it in his power by paying the amount due on the note held by Stapp on that debt, and by taking that course, he could have secured the assignee, to that extent, against the hazard of loss by the subsequent insolvency of Stapp and his failure to remove the lien, we have reached the conclusion, though we confess not without some hesitation, that it was his duty to take that course, and that he should have been adjudged liable to the bank for whatever would, by that course, have been saved to it,—that is, the difference between the amount of the last three notes and the amount paid to remove Holloway's lien.

That the bank holds other securities which may be sufficient to satisfy its debt, we do not regard as material; but, if material, the burden was on Lagow to show the fact as one necessary to raise the equity he is asserting. *Waterman on Set-off*, Sec. 410.

Judgment *reversed* and cause remanded for a judgment in conformity to this opinion.

Judge Cofer filed, November 19, 1878, the following response of the court to the petition of counsel for appellee for a rehearing:

We attempted to draw the distinction between a legal defense—that is, a defense authorized by the statute—and an equitable defense, or one which could be made independently of the statute. When counsel say Lagow's defense to the notes existed on the making of them, we are prepared to agree with them if they mean an equitable defense; but if they mean he had all the time a legal defense, then we think that they are in error. The deed contains no covenant against encumbrances, but merely a covenant of warranty, and of that covenant there was no breach until long after notice of the assignment; and if he had been sued by Stapp on any of the notes maturing before the debt to Holloway's executor he would have had no defense on account of the existence of that lien alone, because Stapp's contract had not been broken in any way, and in order to make a valid defense Lagow would have been compelled to show insolvency, non-residence, fraud, or some other equitable reason why the chancellor should interpose with his preventive process. As the chancellor only interferes with the assertion of legal rights so far as necessary to prevent injustice, one who sets up an equitable defense and appeals to the chancellor for aid must not only make out a case showing that, unless equity will interpose,

he will suffer injustice, but it must not appear that he had the means of indemnity in his own hands, for it is a maxim in equity that the negligent will not be assisted.

Lagow had it in his power to partially protect himself by paying the note maturing in January, 1875, to Holloway's executor, and thereby showing that he had been compelled to pay the residue of that lien and would lose it unless permitted to retain it out of the notes held by the bank. He would have had, not a legal, but an equitable defense pro tanto against these notes. But instead of this, he neglected to indemnify himself when he could have done so, and now asks the chancellor to indemnify him at the expense of the bank. In such a case the chancellor will treat Lagow as standing just where he would have stood if he had protected himself as far as lay in his power and will not permit him to cast upon the bank the loss that must result from his own laches.

We have not overlooked the fact that this case was tried at law, but treat it as an equity because the whole defense was equitable and not legal. That the note maturing January, 1875, was paid through the cashier of the appellant does not affect the question. The cashier did only what Lagow directed, and acted in the matter for him, and not for the bank.

Petition overruled.

Vance & Merritt, for appellant.

J. W. Lockett, M. Yeaman, for appellee.

R. L. SPILLMAN, ET AL., v. SAMUEL SWANGO, ET AL.

Recitals in a Deed—Consideration.

The recitals in a deed import a valuable consideration paid for the land as between the parties to the deed, and also to strangers when the deed is prior in date to the equity asserted against it, otherwise when the equity asserted is prior in date.

Confession and Avoidance—Burden of Proof.

A plea that the defendant is an innocent purchaser is in the nature of a confession and avoidance, in which the burden of proof is always on the party pleading it.

APPEAL FROM WOLFE CIRCUIT COURT.

November 1, 1878.

RESPONSE BY JUDGE COFER:

Counsel is mistaken when he says the recitals of the deed from Gregory to appellants imports a valuable consideration paid for the land, and the onus was on the appellees to rebut the presumption raised by the recitals. This is true as between the parties to the deed, and is also true as to strangers when the deed is prior in date to the equity asserted against it, but is not true when the equity existed prior to the date of the deed.

A plea that the defendant is an innocent purchaser is in the nature of a confession and avoidance, in which the burden is always on the party pleading it. This case well illustrates it. The contract between the appellees and Sewells has been decided to be fraudulent, and the appellants can derive no valid title from Sewells because they did not have such a title.

But they may say, notwithstanding Sewells' title was invalid because procured by fraud, and notwithstanding the conveyance from Sewells to Gregory was voluntary, our title is good and we ought to be protected because Sewells had a title valid on its face, and we bought and paid for it without notice of Sewells' fraud. The only merit in the defense they pleaded was in the alleged fact that they had paid for the land in ignorance of the fraud, and they were bound to prove the payment of the consideration. That is an affirmative fact which lies in their knowledge, and not in the knowledge of the appellants, and reason as well as authority casts the burden on them. *Halstead v. Bank of Kentucky*, 4 J. J. Marsh. 554; *Royal v. Miller*, 3 Dana 56.

The recitals in the deed of the payment of the purchase money is no evidence against the appellees of the fact recited. *Mitchell v. Maupin*, 3 T. B. Mon. 185; *Goins v. Allen, Morton & Company*, 4 Bush 608; *Whitaker v. Garnett*, 3 Bush 402. Petition overruled.

John T. Hazelrigg, for appellants. H. C. Lilly, for appellees.

LEWIS ADKINS v. W. C. GILLIS, ET AL.**Judicial Sale After Confirmation—Not Set Aside.**

After a judicial sale has been confirmed it cannot be set aside for mere deficiency in quantity or for errors in the boundary.

APPEAL FROM WHITLEY CIRCUIT COURT.

November 2, 1878.

OPINION BY JUDGE COFER:

After a judicial sale has been confirmed it cannot be set aside for mere deficiency in quantity or for errors in the boundary.

Caveat emptor applies, and it requires a stronger case to set aside the sale than to set aside a private sale which has been executed by a conveyance. The purchaser at a judicial sale must look to the judgment and record under which he buys, and to the title to the property, and after the sale is confirmed he cannot escape the payment of the bonds on account of a simple deficiency in quantity or error in boundary. *Todd v. Dowd's Heirs*, 1 Met. 281; *Megowan v. Pennebaker*, 3 Met. 501.

That Williams was not a party does not affect the validity of the sale.

Judgment *affirmed*.

R. D. Hill, for appellant.

JOHN ROBINSON v. COMMONWEALTH.**Criminal Law—Manslaughter—Instructions.**

One convicted only of manslaughter cannot be heard to complain of even an erroneous instruction relating only to the law of murder.

Malice—Proof of Drunkenness.

Drunkenness may be proved in a murder case to rebut proof or inference of malice, but for no other purpose; and where one charged with murder is convicted only of manslaughter, an offense of which malice is not an ingredient, he is not prejudiced by the refusal of the court to instruct on that subject.

APPEAL FROM MARION CIRCUIT COURT.

November 7, 1878.

OPINION BY JUDGE COFER:

We need not inquire into such of the instructions as relate to the law of murder, as it is not perceived that they could, even if erroneous, have prejudiced the appellant, who was only found guilty of manslaughter.

The killing seems not to have been controverted, and was assumed as a fact proven in the case in the instructions asked by the appellant's counsel, as well as in those given by the court, and this technical error did not prejudice his rights.

The indictment charged the appellant with murder only, and did not embrace the special statutory offense defined and denounced by Sec. 2, Art. 4, Chap. 28, General Statutes, page 322. *Connor v. Commonwealth*, 13 Bush 714. The jury, in finding that the appellant was guilty of manslaughter, necessarily found the killing was intentional.

Drunkenness may be proved in a case like this to rebut proof or inference of malice, but for no other purpose. *Shannahan v. Commonwealth*, 8 Bush 463; *Nichols v. Commonwealth*, 11 Bush 575. As the appellant was not convicted of an offense of which malice is an ingredient he was not prejudiced by the refusal of the court to instruct on that subject.

The whole law of the case, as far as relates to the crime of manslaughter, was correctly given, and the judgment is *affirmed*.

Russell & Arritt, for appellant. Moss, for appellee.

JOHN DEVOR, ET AL. *v.* J. L. WOOLFORD.

Sheriff's Liability—Homestead.

A sheriff is not entitled to a homestead exemption as against his liability to the commonwealth or to the county for the public revenue collected by him.

Sheriff's Sale of Land to Pay Taxes—Irregularities.

Where the sheriff fails to advertise the land levied upon by him before making sale, a purchaser in good faith will not be affected by the irregularity. Neither does the failure of the sheriff's return to state that he sold the land at the court-house door, if actually made there, affect the title of the purchaser.

APPEAL FROM LINCOLN CIRCUIT COURT.

November 7, 1878.

OPINION BY JUDGE COFER:

It was decided in *Commonwealth v. Cook*, 8 Bush 220, that a sheriff was not entitled to a homestead as against his liability to the commonwealth for the public revenue collected by him. And in *Bonta v. Mercer County Court*, 7 Bush 576, the county levy was treated as the revenue of the state in so far that the rights of the county could not be affected by the laches of public officers any more than the rights of the state. The reasons upon which the opinion in the former case rested, in part at least, apply with equal

force to a sheriff who has collected the county levy. We must, therefore, adhere to the opinion at first expressed on this point.

Mrs. Devor clearly manifested no right to relief on account of the alleged use of money coming to her from her father's estate in paying for the land. The judgment in favor of the commonwealth, for reasons stated in the former opinion, was not invalid, and the assignments of Roy & Coffey and of the auditor vested in the appellees all the rights of their assignors.

Upon a re-examination of the questions affecting the sale under the executions, we are satisfied it is not invalid, because the returns do not show that the land was appraised and that the sale was at the court-house door.

The description of the land is sufficiently specific. *Bell v. Weatherford*, 12 Bush 505. If the sheriff fails to advertise the land a purchaser in good faith will not be affected by the omission. *Lawrence v. Speed*, 2 Bibb 401; *Hayden v. Dunlap*, 3 Ib. 216; *Webber & Stith v. Cox*, 6 T. B. Mon. 110; *Kilby v. Haggin*, 3 J. J. Marsh. 208; *Faris v. Banton*, 6 J. J. Marsh. 235; and for like reasons his failure to cause the land to be valued will not render the sale void. *Reid v. Healsey*, 9 Dana 322; *Anderson v. Briscoe*, 12 Bush 344.

The sheriff actually sold the land at the court-house door, and the failure to state the fact in his return does not affect the title of the purchasers. 12 Bush 505.

The answer and cross-petition of Mrs. Devor, adopted by her husband in his answer, set up the agreement on the part of Weatherford to allow the two and one-half acres sold under the decree to be redeemed, and the court having found that against the appellees, properly subjected the property to sale to pay the unpaid balance of their bid.

Judgment affirmed.

John S. VanWinkle, G. W. Dunlap, Fox, Grigsby & Fox, J. & J. W. Rodman, for appellants.

Durham & Jacobs, Hill & Alcorn, for appellees.

RICHARD WAYMAN v. COMMONWEALTH.

Criminal Law—Homicide—Attorney for Commonwealth.

One accused of murder cannot complain because the prosecution was conducted by an attorney who was not the regular attorney for the commonwealth. Such fact is not prejudicial to the defendant, and the fact that the attorney who prosecutes is one of great ability is not a cause for a new trial.

APPEAL FROM ADAIR CRIMINAL COURT.

November 7, 1878.

OPINION BY JUDGE PRYOR:

It may be doubted whether the accused has any record before us from which an appeal could be taken.

The motion for a new trial was overruled, or the grounds dismissed for the reason that appellant had made his escape and was in no condition to submit himself to the action of the court. At a subsequent term, when again arrested, he is permitted to file his bill of exceptions, and to present his reasons why a new trial should be granted. This is certainly a liberal practice, and while this court is not disposed to sanction it, for the purposes of this case it is sufficient to notice the errors complained of in the court below.

That the accused was prosecuted by another attorney than the regular attorney for the commonwealth cannot be assigned for error, and although Thompson is the commonwealth's attorney for an adjoining district and prohibited from prosecuting elsewhere, he alone must suffer the penalty, if any, and his action, unless prejudicial to the accused, will not be considered. It is not pretended that any advantage was taken of the accused or his counsel, and the ability of Thompson as a lawyer and advocate affords no reason for granting a new trial or of withholding the punishment for the offense committed.

That Newcomb and others were permitted to state that they were not present when the old man was murdered and knew nothing of it, did not prejudice the appellant nor conduce to show that he was the guilty party; it only established the fact that the witnesses were not *particeps criminis*, and this the commonwealth had the right to prove; and although the effect of their statements tended to show that some one else than Sublett and Newcomb were the murderers, it by no means followed that it was the appellant. An indirect attempt was made to prove that these witnesses were the criminals, and it was perfectly legitimate for the commonwealth to prove, either by these very parties or others, that it was impossible for them to have been present.

We see no objection to any of the instructions found in the record that were given by the court, nor any error in refusing those asked by the accused. All of the instructions are not before the court; still, with an incomplete record, we have given the case a careful

consideration and find no error in it prejudicial to the appellant, and the judgment must therefore be *affirmed*.

Winfrey & Winfrey, for appellant. Moss, for appellee.

WILLIAM A. MERRIWEATHER, ET AL., v. CHARLES H. PETIT, ET AL.

Conveyance to Church—Creation of Trust.

No particular form of words is necessary to create a trust, nor need it be created by deed. It will be sufficient that the intention to create a trust be clearly established and the object of the trust distinctly manifested; and its existence may be shown by any writing signed by the person sought to be charged as a trustee, if it clearly expresses the trust and sufficiently connects the trustee with the subject-matter of the trust.

Beneficiaries of a Trust.

Where a trust is created in favor of the Protestant Episcopal church and its trustees receive conveyance of real estate, a congregation not professing or practicing the doctrine, discipline or worship according to the order of that church, cannot assert a beneficiary interest in the property.

APPEAL FROM LOUISVILLE CHANCERY COURT.

November 9, 1878.

OPINION BY JUDGE COFER:

The deed to the lot in contest is to "Charles H. Petit, William McCready, and W. A. Merriwether, trustees of Emanuel Episcopal Church of the diocese of Kentucky, in the city of Louisville," but it contains no other words indicating a trust or the uses for which the conveyance was made. Whether the language employed in the deed would of itself create an enforceable trust we need not decide, because, in our opinion, the writing addressed by Petit, McCready, and Merriwether, to the assistant bishop of the diocese of Kentucky on the 16th of December, 1871, when considered in connection with the canon of the church, removes any doubt or uncertainty that might otherwise have existed.

That writing reads as follows: "We, the trustees and church wardens, and vestrymen of Emanuel church in the city of Louisville, Jefferson county, Kentucky, being in the good providence of God, in the possession of a house of worship erected to God, the Father, and for the Son and Holy Ghost, and for the celebration of divine

worship according to the order of the Protestant Episcopal Church in the United States of America, in its doctrine, liturgy, rites, ministry, and usages, do hereby request the Right Reverent George D. Cummins, D. D. Assistant Bishop of the diocese of Kentucky, to take the said house under his spiritual jurisdiction, and that of his successors in office, and to consecrate it to the worship of Almighty God, the Father, the Son, and the Holy Ghost, by the name and title of Emanuel church, and thus to separate it henceforth from all unhallowed, ordinary and common uses; to dedicate it to the service of God for reading and preaching His Holy Word, for celebrating His Holy Sacraments, for offering to His glorious Majesty the sacrifice of prayer and thanksgiving, for blessing His people in His name, and for the performance of all other holy offices according to the order of the Protestant Episcopal Church in the United States of America.

In testimony whereof, we have hereunto set our hands and seals, this 16th day of December of the year of our Lord, one thousand eight hundred and seventy-one.

(Signed) W. A. MERRIWEATHER.

WILLIAM MCCREADY.

CHARLES H. PETIT."

This order was made in order to conform to a canon of the church which reads as follows: "No church or chapel shall be consecrated until the bishop shall have been sufficiently certified that the building and ground on which it is erected have been fully paid for, and are free from lien or other encumbrance; and, also, that such building and ground are secured, by the terms of the devise or deed, or suscription by which they are given, from the danger of alienation from those who profess and practice the doctrine, discipline and worship of the Protestant Episcopal Church in the United States of America," etc.

No particular form of words is necessary to create a trust, nor need it be created by deed. It will be sufficient that the intention to create a trust be clearly established, and the object of the trust distinctly manifested. The existence of a trust may be established by any writing signed by the person sought to be charged as a trustee, however untechnical or informal, if it clearly expresses the trust and sufficiently connects the trustee with the subject-matter of the trust. 4 Kent, 468; *Aynsworth v. Haldeman*, 2 Duv. 565.

The deed from Lyon shows with reasonable certainty the intention to create a trust, and when considered in connection with the

request addressed to the bishop, and the canon we have quoted, every requisite of a valid trust is established.

Nor do we perceive any tenable ground upon which we can base the conclusion that the trust was intended for the benefit of the particular congregation worshiping at that place, irrespective of its ecclesiastical connection, so as to warrant the judicial decision that a majority of the congregation had a legal right to take the property with it into another church. That one of that majority paid for the lot with his own means may give him and his associates a strong claim to it as the repayment of the price paid by him, but cannot constitute a controlling element in the decision of this case in the secular courts. He made his donation to a local society in union with the Protestant Episcopal Church in the United States, and by the request addressed to the bishop to consecrate the house declared that it had been "erected for the celebration of divine worship according to the order of the Protestant Episcopal Church in the United States of America in its doctrine, liturgy, rights, ministry and usages," and requested that it be so dedicated, thereby declaring the beneficiaries to be the members of a local society of Christians worshiping at that place according to the order of the Protestant Episcopal Church in its doctrine, liturgy, rites, ministry and usages.

It is true the lot is not mentioned in the request, but the canon provides that no church shall be consecrated until the bishop is sufficiently certified that the ground on which it is erected has not only been paid for and freed from all liens and encumbrances, but secured from the danger of alienation from those who profess and practice the doctrine, discipline and worship of the Protestant Episcopal Church. This canon must have been known to the trustees when they signed the request, and they must have intended to be understood as tendering a house which, according to the law of the church, could be consecrated.

The appellants and those they represent are not members of a congregation in union with the Protestant Episcopal Church, nor do they profess or practice the doctrine, discipline or worship according to the order of that church. The Reformed Protestant Episcopal Church with which they are in connection is a distinct and separate organization, not only in fact and in name, but in doctrine and policy.

Nor do we think the appellants can succeed on the ground that

there are no beneficiaries answering the description contained in the writings evidencing the trust. They do not claim that all the members of the congregation united with them in attaching themselves to the Reformed church; and the evidence shows that those of its members who did not do so have organized and have demanded to be put in possession, and we will not consider, what would otherwise be a question, whether the appellees, McCready and Petit, holding the title as trustees, might not control the property and prevent its use by persons not beneficiaries of the trust. We decided in *Newman v. Proctor*, 10 Bush 318, that there being no person or society answering the description of beneficiaries the action could not be maintained, but those who sued in that case had no title in themselves, and were charged with no duty in respect to the property, and were therefore under the necessity to show that they represented persons who had a right to enforce the trust. Not so here. McCready and Petit hold the property jointly with Merriweather, and are charged with duties respecting the property, and an unquestionable right to maintain the suit to preserve the trust.

Because the title is in part vested in them, it is wholly immaterial whether they used to be or ever were members of the congregation or were selected by it as trustees or not. The majority of the congregation having united with the Reformed church divested themselves of all interest in the property. This is not a case for the application of the statute respecting a division or schism in a church. Schism is a breach of unity between persons of the same religious faith without any disturbance of the relation of either party with the denomination of Christians with which the whole society was previously connected. *McKinney v. Griggs*, 5 Bus 401.

No objection was taken in the court below on account of defect of parties, and any that might have been argued was waived. We cannot enter into the question whether it is a hardship that the appellants should lose property paid for by one of their number. Whatever he invested he unconditionally donated to the use of a congregation worshiping according to the order of the Protestant Episcopal Church in the United States, and this court has no alternative, but must adjudge the rights of the parties according to the law of the land.

Since the foregoing was written the case has been fully and ably reargued. After listening to the last argument we thought that, as the deed did not prescribe the use for which the property was to be

held, and as the congregation was not at the date of the deed in union with any ecclesiasticism, and its right to the use did not originally depend on such union, its rights could not be affected by the acts of the trustees in tendering and causing the property to be consecrated to the use of a congregation worshipping according to the order of the Protestant Episcopal Church. But upon further reflection we have become satisfied that the record discloses facts which show that whatever may have been the rights of the congregation they must be held to have assented to what the trustees did, and to be bound by such assent.

The consecration of the church was a solemn public act, and may be safely presumed to have been performed in the presence of a large part of the congregation, and to have been known to all. That rite was performed in December, 1871, without objection, as far as appears from any source, made at the time or afterwards, and the congregation, with knowledge of the consecration and the law and usage of the church and the acts of the officers of the congregation under which it was performed, continued without objection until July, 1874, to be represented in the convention of the diocese and in its connection with the church at large. We think we would do violence to these facts to hold that although the acts of the trustees in tendering and causing the property to be dedicated was a declaration of the uses for which it was conveyed sufficient to bind them, they did not bind the congregation because the trustees had no power to make such a declaration. On the contrary, the facts and circumstances leave no room to doubt that what the trustees did was at the time understood and approved by the congregation, and having been so long passively, at least, recognized as correct, it should be held to have been done with the approval of the entire congregation; and so whatever the original design may have been, all must be regarded as concurring in the acts of the trustees procuring the consecration which forever dedicated the property to the use of the congregation worshipping according to the order of the Protestant Episcopal Church of the United States.

The judgment must therefore be *affirmed*.

Humphrey & Marshall, F. M. Huffaker, for appellants.

Simerall & Bodley, for appellees.

CLOVEPORT COAL & OIL COMPANY v. WILLIAM KINGSBURY.

Liability of Corporations.

The capital and property of a corporation, although it may have ceased to exist, is a trust fund for its creditors, and will be seized by a court of equity and applied to the payment of its debts.

Statute of Limitations.

When, by reason of the dissolution of a corporation, and its officers, agents and managers having left the state, there was no one left upon whom to serve process, the statute of limitations ceased to run against one having a cause of action against it.

APPEAL FROM BRECKINRIDGE CIRCUIT COURT.

November 12, 1878.

OPINION BY JUDGE PRYOR:

The rule of the common law, say Angell & Ames on Corporations, in relation to the debts of a corporation, has become obsolete and odious, and at this day the equitable rule is that the capital and property of a corporation, although it may have ceased to exist, is a trust fund for its creditors and will be seized by a court of equity and applied to the payment of its debts.

There is no pleading in this case alleging any other indebtedness by this corporation than that asserted by the appellee, and no suggestion of record that this case go to the master to adjust the affairs of the corporation. The record may show an indebtedness other than the claim asserted, but these creditors are not before the court or asking any relief, and besides, if they have a claim in the trust fund this judgment cannot prejudice the rights of the appellants, as they are not creditors.

The fact that there was no one to sue after the year 1862, by reason of the dissolution of the corporation and its managers, agents and stockholders leaving the state at that time, obstructed the right of recovery or the remedy afforded the appellee, and the statute ceased to run against his claim. It is evident that the appellant prosecuted the action on the notes without any authority, and when it was not the real owner. It has not attempted, although the sale made to it was affirmed as late as the year 1862, and the charge of fraud and want of ownership distinctly made, to show any other evidence of its right to the notes than the bare assignment. The testimony of Adams and Bennett, the only parties outside of the corporation who ought to have some knowledge of the transaction,

conduces to the conclusion that these notes did not belong to the appellant, and if they did some of the officers or stockholders of the corporation could have given a statement of the manner in which the appellant became the owner, and relieved this case of the mystery in regard to the notes for which the land in controversy was sold. The account of the appellee is proven at least to such an extent as warranted the judgment below.

The original action instituted by the appellee for the recovery of the land by reason of a sale under a former attachment for the same debt, is no bar to the recovery here. That record shows an offer to litigate this question, and at the instance of the appellant or its tenant the amended pleading presenting the issue was refused to be filed. The tenant of appellant had entered under a purchase made from the defunct corporation, and the court in that case said, in substance, it mattered not how much fraud was practiced by the appellant with reference to the land, the appellee must seek his remedy against the appellant in an original action. The sale of this land was confirmed to appellant in 1868. The notes are assigned without date to the assignment. Appellee says that he did not discover the fraud of the appellant until Adams and Bennett testified, and we think the statute has not run against either the account or the right of the creditor to assert his claim against the trust fund. The judgment is therefore *affirmed*.

Kinchelve & Eskridge, for appellant.

Williams & Brown, for appellee.

HENRY McCLUGHAN v. W. B. CUNDIFF.

Sale of Real Estate—Vendor's Lien—Renewal of Lien Notes.

A vendor, who in his conveyance of real estate retains a lien for the balance of purchase money, does not lose his lien by taking new notes. The lien goes with the debt into the hands of its owner and the assignment of such notes carries with it such lien.

APPEAL FROM BULLITT CIRCUIT COURT.

November 13, 1878.

OPINION BY JUDGE ELLIOTT:

H. A. Mooney sold a tract of land to the two McClughans and conveyed it to them, reserving a lien for the five annual payments of \$600 each.

Three of the notes evidencing Mooney's claim were assigned to appellant, and all of the two notes which he retained were paid except \$200, and he thereupon surrendered the two notes of \$600 each first due on the land to W. M. McClughan, Sr., who then owned all the land for which they were executed, and as there was a balance due on them for \$200 he took McClughan's note for this sum, payable at a certain time and place in cord wood.

Soon after its execution this note was sold and transferred to appellee. After the execution of this \$200 note, W. M. McClughan sold and conveyed to appellant the land he had bought from Mooney in payment of the three notes for the purchase money held by him, and at the time of this sale to McClughan by McCubbin the evidence conduces to prove that McCubbin represented that the notes due to McClughan were all that he owed on the land.

But the evidence of McCubbin and Straus both conduce to prove that appellant knew before McCubbin conveyed to him that the \$200 note was not paid, and that appellee claimed that he had an enforceable lien on the land for payment.

We do not think that Mooney lost his lien by taking a new note for the balance of the purchase money secured by the deed to McCubbin. The modern doctrine is that the lien goes with the debt into the hands of its owner, and, as appellee purchased the note and the same was assigned to him, the lien passed to him with the note.

As the court of equity could alone enforce this lien, the equitable action was proper; and as neither of the parties asked that the damages be assessed by a jury, the chancellor had a right to assess them, and he fixed the balance of the claim at its true amount under the proof.

Although it is doubtful as to whether appellee could recover and enforce his lien by virtue of the lien reserved in the deed of Mooney to McCubbin, still we think from the evidence that appellant, before his purchase, had actual notice of this claim, and this relieves this court of a close examination of the question of appellee's right to enforce the lien without proof of actual notice of it brought home to appellant.

Wherefore the judgment of the lower court is *affirmed*.

R. J. Meyler, for appellant. F. P. Straus, for appellee.

J. M. BRYANT *v.* AMERICA L. JOYCE.**Appeals—Motion for New Trial.**

Nothing is brought before the court of appeals in an appeal where no motion for a new trial has been made, except the pleadings, verdict and judgment, and the grounds alleged must be specific as to the errors relied upon for a reversal.

Assignment of Errors.

An assignment that the verdict is against the law and the evidence will only authorize this court to consider the evidence on which the verdict is based.

APPEAL FROM JEFFERSON COURT OF COMMON PLEAS.

November 14, 1878.

OPINION BY JUDGE PRYOR:

It is now too late to question the practice of this court, established by a current of uniform decisions, as to the nature and character of the grounds on which a motion for a new trial must be heard in the court below. Nothing is brought before this court where no motion for a new trial has been made, except the pleadings, verdict and judgment, and the grounds alleged must be specific as to the errors relied on. That the court erred in refusing or giving instructions will be deemed insufficient, or that the court permitted incompetent evidence to go to the jury, or excluded evidence that should have gone to the jury.

That the verdict is against the law and evidence will authorize this court to consider only the evidence on which the verdict is based, and if there are no valid grounds for a new trial in the court below, the defect cannot be cured by an assignment of errors. It is not assigned for error in this court that the verdict is unsustainable by the evidence, and the judgment that it is erroneous, considering the exceptions regarded as error, were properly taken. It might possibly be implied that the judgment or verdict was erroneous from the exceptions made in regard to the instructions, if this had been assigned as a ground for a new trial in the court below. If under the errors assigned this court can go so far as to consider the evidence, it then results that in all the proof introduced on the issue of title, possession and boundary, there is sufficient testimony to sustain the verdict. The court below so regarded in overruling the motion for a

new trial, and that there is a conflict in this testimony there can be no doubt. The judgment is therefore *affirmed*.

Harper v. Harper, 10 Bush 447; *McLain v. Dibble & Co.*, 13 Bush 297; *Maxwell v. Dudley*, 13 Bush 403.

Bullock & Anderson, Barr, Goodloe & Humphrey, L. Dodd, for appellant.

Bullitt & Bullitt, Harris, for appellee.

JOHN D. HEARN, ET AL., v. COVINGTON CITY COUNCIL.

Mandamus—Discretion of City Council.

Where the general assembly, by an act, provided that the city of Covington might submit the question to a vote of the citizens, as to whether the city would issue its bonds in a sum not exceeding \$800,000 to construct a bridge across the Ohio, and after a majority of the votes were cast in the affirmative the city council ascertained that the bridge would cost largely more than the sum named, and that the consent of the state of Ohio had not been secured to erect such bridge, the council has the right in the use of its discretion to refuse to let such contract, and to issue the bonds.

APPEAL FROM KENTON CHANCERY COURT.

November 15, 1878.

OPINION BY JUDGE PRYOR:

At the start of the institution of this suit for a mandamus against the council of the city of Covington, there had been no money expended, so far as this record shows, in the construction of a bridge across the Ohio river, or any liability whatever incurred by the city on account of the contemplated improvement. A majority of the votes polled at an election held in the city favored some legislation that would authorize the construction of the improvement, and expenditure of \$800,000 for that purpose, the money to be raised by the issuance and sale of the bonds of the city. Application was made to the legislature of the state, and a law enacted investing the city with the power to contract for the construction of the bridge through the agencies and in the manner designated by the act. The city council was required to submit the question to the voters of the city as to their willingness to assume the payment of an annual tax, to meet the interest on the bonds to be issued, and to constitute a sinking fund for the payment of the principal debt. The act reciting

"When the election shall be ordered and notice thereof given by the city council at such time and in such mode as the council shall direct, and upon a majority favoring the tax, the bonds shall be issued and sold and the tax levied and collected." Trustees were required to issue and sell the bonds, who were to be appointed for that and other purposes by the judges of the Kenton circuit and county courts and the mayor of the city. The city council undertook to carry out the provisions of the law by passing an ordinance designating the time and place for an election, and calling on the voters to express themselves for or against the levy of the tax.

This ordinance was afterwards repealed, and the present appellants, believing that the city council was not acting in good faith, asked that they be compelled to order the election as required by the enactment. The reasons given by the council for its action are: 1st. They had ascertained by a committee appointed for that purpose that the structure contemplated would cost one million five hundred thousand dollars, instead of eight hundred thousand; 2d. No legislation had been obtained from the state of Ohio authorizing the construction of the bridge or any part of it within the limits of that state. 3d. The city was then indebted about one million of dollars, and the interest was being paid by the levy of an annual tax, and to increase the burden would be oppressive on the citizens.

It seems that the site for the bridge had neither been selected or obtained, and the expenditure necessary to its completion not made the subject of inquiry until the vote for a levy of the tax was about to be polled. No preliminary step was taken to secure this large expenditure of money, in completing an improvement deemed of so much importance to the city of Covington; and it is now demanded as a matter of right that the council shall place the city in a condition, where its bonds can be issued for \$800,000 and placed on the market, when it is evident that the assumption of such a heavy burden is but the beginning of the expenditure for such an improvement. The location of the bridge has not been fixed—the right of property secured for the purpose or the consent of the state of Ohio obtained to its construction.

It is insisted by appellants that the council has no discretion with reference to the vote upon the question, and the legislative will having been consulted both as to the means necessary to construct the bridge, and the benefits to be derived from it, there is no alternative left but to place the city in a condition to make the expenditure.

The legislature was only asked to invest the city with the power to construct the improvement through its properly constituted agencies at a cost not exceeding eight hundred thousand dollars; and to adjudge that these having control of the financial interests of the city are divested of all discretion, and must expend the money or take such steps as will enable others to expend it, although insufficient to complete the structure, would be a disregard of the plain meaning and object of the law. Every statute should be construed according to its meaning, and the intention of the lawmakers followed with reason. The legislature never designed that the city council should take any step by which the bonds of the city amounting to \$800,000 could be issued to build the bridge, when it was made apparent to the council that the expenditure would be useless unless the burden was increased to twice the amount in order to its completion. The mere authority to contract did not take from the city legislature all discretion over the subject. The interest now annually paid by the city is not less than seventy thousand dollars, and to have doubled this tax in the way of interest, to say nothing of the increase of the principal debt, would not only have been onerous, but resulted in levying a tax for no purpose, unless the principal sum for constructing the bridge could have been increased to one and a half million of dollars. The city council had the right to decline to act under the law. The judgment below is therefore *affirmed*.

Charles T. Eginton, W. W. Cleary, for appellants.

Stevenson & O'Hara, for appellees.

ALEXANDER HANNAH *v.* HIRAM BAKER, ET AL.

Bond for Deed—Parol Contract of Sale of Land.

The effect of a bond for a deed cannot be avoided by proof of a parol rescission, for such a contract is within the statute of frauds and cannot be enforced.

Parol Contract to Rescind Executory Contract.

A parol contract to rescind an executory contract for the sale of land may sometimes be set up as a defense, but it cannot be proved to enable a plaintiff to recover in ejectment.

APPEAL FROM CARTER CIRCUIT COURT.

November 16, 1878.

OPINION BY JUDGE COFER:

The appellees alleged that the appellants were in possession of a part of the land sued for, claiming it as their own, and it appears from the evidence that the 93 acres adjoins the tract on which appellant, Alexander Hannah, resides, and also adjoins the tract on which Robert Baker resided and on which some of the appellees now reside. When Robert Baker executed the bond to Hannah, and the latter took possession of a part by enclosure, if not by the simple fact that he resided on adjoining land, he was in constructive possession of the whole tract; and although his possession may not have been adverse to Baker, yet it was his possession and not Baker's. And Baker's bond still held by Hannah must defeat an action by Baker's heirs to recover the land, and they cannot avoid it by proof of a parol rescission, for such a contract is within the statute of frauds and cannot be enforced. True, the Bakers still hold the legal title in trust for Hannah, and they cannot set up a title thus held and recover on it against those for whom they hold.

A parol contract to rescind an executory contract for the sale of land may sometimes be set up as a defense, but we are not acquainted with any case holding, or with any legal principle upon which it can be held, that such a contract can be proved to enable a plaintiff to recover in ejectment.

If there was a parol rescission, and the possession was in fact surrendered in execution of that contract, and appellants afterward entered on the land, ejectment might be maintained on the possession acquired by the surrender and subsequent occupation by the plaintiffs; but there is no evidence of any such possession in them subsequent to the alleged rescission.

The execution of the bond by Robert Baker was not questioned, and there being no evidence of a surrender of the possession by Hannah or of actual possession by Baker or his heirs, no ground for a recovery was made out and the court should have directed the jury to find for the defendants.

Judgment *reversed*, and cause remanded for a new trial upon principles not inconsistent with this opinion.

E. F. Dulin, William Bowling, for appellant.

E. B. Wilhoit, for appellees.

MORG T. DUNCAN'S TRUSTEE v. CITY OF LOUISVILLE.**Recovery of Taxes Paid.**

In the absence of fraud or mistake, taxes voluntarily paid to the proper authorities cannot be recovered.

Power of Courts to Correct Erroneous Assessments.

The courts have no power in a collateral proceeding to inquire into the correctness of the valuations made by the city assessors.

APPEAL FROM LOUISVILLE CHANCERY COURT.

November 18, 1878.

OPINION BY JUDGE COFER:

This anomalous proceeding was instituted to recover back money paid to the city as taxes on certain property belonging to the estate of John L. Martin, deceased, on the ground that the property was assessed at greatly more than its value for the years 1857 to 1874, inclusive.

Neither fraud nor mistake is alleged. The ground for relief seems to be that the beneficiaries for whom the property was held were infants or married women, or were absent from Louisville on business or pleasure a great part of the time during which these alleged excessive collections were made. It does not appear who paid the taxes. If Martin's executors paid them, as we assume from the allegation that they held the property up to 1874, when deeds of partition were made to Martin's devisees, it does not appear upon what ground the appellants claim to be entitled to recover back a part of the money so paid.

But a more serious objection exists in the fact that the courts have no power thus collaterally to inquire into the correctness of the valuations made by the city assessors. If such power exists in one case it exists in every case, not only in Louisville but in every city, town and county in the state, in which a local ad valorem tax is levied, and the result would be that the whole judicial force of the state would be unequal to the task of revising the action of local commissioners of tax.

When a mode of contesting assessments is provided by statute that mode must be pursued. When no other is provided, the body imposing the tax may have authority, if applied to in convenient season to correct such errors, but whoever else may or may not

have it, it is certain courts of chancery have it not unless it be conferred by statute, which is not claimed.

The judgment must therefore be *affirmed*.

B. Duncan, for appellant. T. L. Bennett, for appellee.

JAMES GREENWADE v. COMMONWEALTH.

Criminal Law—Homicide.

Where in a murder case the evidence indicates that the killing was done by one not indicted with the accused and where the indictment contains no specific charge that the accused was present aiding and abetting the commission of the crime, an instruction is erroneous which says to the jury in substance, that if the accused was present, aiding in the commission of the crime, he was as guilty as the man who did the killing. In the absence of the indictment of the other man and in the absence of a charge against the accused of aiding and abetting, before he can be found guilty it must be found that he fired the shot that killed the deceased.

Evidence of Conversation.

Where the commonwealth in a criminal case introduces a part of a conversation had with the defendant, the defense has the right to give the whole of the conversation and to explain it fully.

Evidence Inadmissible.

Where no difficulty had occurred between the accused and the person killed, and no threat or demonstration of anger had been made by the accused toward any one, it was error to admit evidence of a witness that on the day of the killing the defendant had said, "That he could shoot a man just to see him kick," where the witness said that the words were spoken in a jocular manner and no reference to the accused or any one else, and the accused was in a good humor and laughing at the time.

APPEAL FROM BATH CIRCUIT COURT.

November 19, 1878.

OPINION BY JUDGE PRYOR:

The appellant, Greenwade, being accused of the murder of Ballard Elam in the county of Morgan on the 18th of February, 1875, was indicted by the grand jury of that county for the offense, and upon his trial was convicted of manslaughter and sentenced to the state prison for the period of twenty-one years.

The facts conduce to show that on the evening of the 18th of

February, 1875, the appellant, the deceased Elam, and one Powell Henry, were in company with each other nearly the entire evening, in the town of West Liberty, and all of them under the influence of liquor. That Henry and the deceased were engaged in quarreling much of the time, resulting finally in a fight between the two, the appellant being present, and is shown to have had a pistol; but whether he used it or gave it to others does not appear. A witness states that after some abusive epithets applied by the deceased to Henry, he saw the hand of the accused with a pistol in it, and his arm extended toward Henry as if he was trying to hand it to him. The three left the place where the fight took place, going a short distance, when two reports of a gun or pistol were heard near where these parties were, and the deceased found a few minutes afterward shot through the body and in a dying condition. It was dark when the deceased was shot, and no one except the parties implicated were present when the firing took place. The accused walked from where the shooting occurred a distance of some twenty or thirty yards, and stated that Henry had shot the deceased. Much testimony was introduced showing the acts and conduct of these parties during the evening, that will not be noticed or its effects discussed, as the case must go back for another trial.

The indictment charges the accused with the murder of the deceased by shooting him with a pistol in the usual form, and upon the trial of the case, the principal ground of defense was that Henry killed the deceased and not the accused.

The court instructed the jury, in substance, that if the appellant was present, aiding in the commission of the crime, he was as guilty as Henry, and to this instruction an exception was taken, based upon the idea that, as Henry was not indicted with the accused, and as there was no specific allegation that the latter was present aiding and abetting the commission of the crime, he must be shown to have fired the shot that killed the deceased before the commonwealth was entitled to a conviction. If this was the only error complained of, this court would sustain the judgment below. Although indicted as principal in the first degree a party can be convicted as a principal in the second degree; and if Henry had been jointly indicted with the appellant, both as principals in the first degree, the same argument could be adduced with equal force against the conviction of the accused. If the testimony conducted to show that Henry did the shooting counsel would say that the accused should be discharged be-

cause the indictment failed to notify him of the particular offense of which he was asked to be convicted, viz.: of aiding and abetting Henry in the shooting of Ballard Elam.

The killing of deceased was the act of all engaged in it, whether as principal in the first degree or as aiders and abettors.

The blow or shot causing the death or injury is in contemplation of law the act of all the parties engaged in it, whether as principals in the first or second degree. There is no necessity for making any distinction in an indictment for either murder or manslaughter between the parties charged with the offense. All who participate or aid in the commission of the crime are guilty; and although one may be guilty of murder and the other of manslaughter by reason of the killing, an indictment for the murder of the person slain, charging all as principals in the usual form, is a sufficient statement of the acts constituting the offense to enable those accused to know what is intended and prepare for their defense; and if one only is indicted, although he may not be the actual perpetrator of the crime, he may be convicted under such an indictment. 1 Wharton on Criminal Law, 130.

By the instructions based on the hypothesis that the shooting was done by Henry, the court below seems to have omitted any instruction that would authorize the jury to find the accused guilty of manslaughter. As was said by this court in the case of *Mickey v. Commonwealth*, 9 Bush 593, in discussing the effect of an instruction in a case like this, that the one aiding and abetting may have acted upon sudden impulse without malice on his part, and in ignorance of the malicious motives of those who actually fired the shots; if so he is guilty of manslaughter and not of murder. It may be murder in the party striking the fatal blow and manslaughter on the part of the abettor. This is not error, as the record is now presented, but upon the return of the case upon a like state of facts an instruction should be given embracing this view of the issue.

The second error complained of is that during the progress of the trial the commonwealth introduced Frank Thomas, who stated that on the evening of the shooting a short time before it was dark the accused handed him a pistol to load; that he did load it and left it in Kendall's grocery, etc. On cross-examination the witness was asked if the accused stated at the time why he wanted it loaded. The attorney for the commonwealth objected to the witness answering the question, and his objection was sustained. The accused

avowed by his counsel he could prove by the witness that when he handed him the pistol he told him he was going that night to McGinn's a distance of five or six miles to see about some hogs, and that as it was rather a bad country where McGinn lived, he wanted his pistol loaded. The object the commonwealth had in view by this testimony was to create the presumption of malice, as well as to repel the idea that Henry was the guilty party, and it was therefore proper to permit anything that was said by the accused to the witness at the time the request to load the pistol was made, in order to explain why he had the weapon in his possession, and the purpose for which he wished it loaded. Whether his intentions in regard to the use of the pistol were expressed in good faith was a question for the jury to decide, and the commonwealth certainly had no right to confine the witness to so much of the statement made by the accused as might conduce to show his guilt and exclude that portion of it tending to explain his possession of the deadly weapon or the use that he intended to make of it.

The third error complained of was the refusal of the court to permit the accused to show an absence of all motive on his part to kill Elam, by proving his interference to prevent Henry from injuring Elam when engaged in the fight, as well as other acts of friendship indicated on the part of the accused toward deceased on the evening of the difficulty.

The testimony on the part of the commonwealth shows that the three, Elam, Henry and the accused, were together during the most of the evening, and the conduct and the actions of the accused during that time is relied on by the commonwealth to establish his guilt. When, therefore, the witness stated that he separated Henry and Elam at the instance of parties present, if at the instance of the accused, the witness should have been permitted to so state on the cross-examination. It was avowed by counsel that the witness would make such a statement and in addition that accused had advised the deceased to go home. All these facts tended to show a friendly feeling on the part of the accused toward the deceased, and should have gone to the jury, along with the acts and conduct of the accused, relied on by the commonwealth as evidence of malice on the part of the accused, and as tending to show that he, and not Henry, fired the pistol.

The fourth error complained of is that the court permitted the attorney for the state to prove the acts and conduct of Henry subse-

quent to the killing, in order to establish his innocence and with a view of showing that the accused was guilty.

Henry was a competent witness for the commonwealth and neither his declarations nor conduct after the killing should have gone to the jury for the purpose of establishing his innocence or the guilt of the accused. The demonstrations on the part of Henry favorable to his innocence as the case was presented to the jury, necessarily implied the guilt of the appellant. It was incompetent and should have been excluded.

The fifth error assigned is that the commonwealth was permitted to prove a statement made by the accused on the day of the killing to the effect "that he could shoot a man just to see him kick." No difficulty had then occurred between Elam and Henry, or if so, no threat or demonstration of anger had been made or exhibited by the accused toward any one. It was spoken, as the witness says, in a jocular manner; had no reference to the deceased or any one else, and the appellant was in a fine humor and laughing at the time, no one paying any attention to it. It was error to admit the statement.

The sixth error assigned is the refusal of the court to permit the statement made by the accused shortly after Elam was shot as to who fired the pistol. It appears that as soon as the shot was fired appellant left the scene of the difficulty and walked a distance of twenty-five or thirty yards, making a statement to the witness as to the manner in which Elam was killed. It is insisted that this was a part of the *res gestæ* and should have been admitted as original evidence. If part of the *res gestæ* it would be competent as against Henry, and certainly it cannot be maintained that a statement made by the accused in explanation of or as to the manner in which Elam was killed is to be received as evidence to establish the guilt of Henry. The statement, if true, shows that appellant was not a party to the act of killing, and had no connection with it except to be present. If Henry was on trial he would be a competent witness, but such statements cannot be received for the purpose of establishing his own innocence. *Bradshaw v. Commonwealth*, 10 Bush 576.

For the errors indicated the judgment is *reversed* and the cause remanded with directions to award the appellant a new trial, and for further proceedings consistent with this opinion.

Judge Elliott not sitting.

H. L. Stone, for appellant. Moss, for appellee.

J. F. SCHOFIELD *v.* MOSES WEINSTOCK.**Assignee of Note—Diligence.**

Where the assignee of a note obtained judgment against the obligors therein soon after it became due in June, 1877, but shows only that he caused execution thereon to issue on the — day of —, 1877, which was returned nulla bona, he fails to exhibit facts showing when execution was issued, and that he proceeded diligently, and hence the assignor is discharged.

Duty of Assignee of Note.

The assignee of a note must show affirmatively that he has used due diligence in coercing collection from the obligors to entitle him to recover against his assignor.

APPEAL FROM SHELBY CIRCUIT COURT.

November 21, 1878.

OPINION BY JUDGE ELLIOTT:

Appellee brought this suit against appellant on appellant's implied liability to him for the amount of a note of \$100 executed to appellant by Miles and Wade and assigned to him by appellee.

Judgment was taken by default in the lower court, and the only question here is whether the plaintiff's pleadings are sufficient to sustain and uphold his judgment. The constitutionality of the law increasing the jurisdiction of the justice who rendered the judgment for appellee against Miles and Wade is assailed by appellant's brief; but as that law has, as we think, been correctly held constitutional, we will not repeat our reasons for so holding. The other objections made by the appellant to the validity of appellee's judgment are of a more serious nature.

Appellee alleges that the assigned note fell due in 1877, in May of that year, and that he brought suit before a justice of the peace of Shelby county to the June term of his court, 1877, and at that term he obtained judgment against the obligors, Miles and Wade; and therefore due diligence thus far has been shown. But the appellee alleged in his petition in this action that he caused execution to issue on his judgment on the — day of —, 1877, returned the same "no property found."

The defect in his pleading is that the plaintiff failed to show that he used ordinary diligence in the collection of his judgment debt against Miles and Wade by causing execution to issue thereon in a reasonable time after the rendition of the judgment in his favor.

His judgment was rendered at the June term of the justices court, 1877, and his execution could have been issued about the 1st of July. But instead of stating the time when his execution issued, so that it could be seen whether he had been guilty of laches, he states that he caused execution to issue on the — day of —, 1877.

Taking these allegations according to their literal meaning the only import that some time between June, 1877, and January, 1878, he caused execution to issue, and that some time afterward the constable returned the same "no property found." These allegations were insufficient. The assignee of a note must show affirmatively that he has used due diligence in coercing collection from the obligors to entitle him to recover against his assignor. But the return by the constable of "nulla bona" was insufficient to entitle the assignee to recourse.

He should have shown that he had filed a transcript of the record in the clerk's office of the circuit court, and had an execution issued and returned there "no property found," before his assignor could be held bound for the assigned debt. See *Barker v. Curd*, 1 Met. 641.

Wherefore the judgment is *reversed* and cause remanded for further proceedings consistent herewith.

L. A. Weakly, for appellant. Caldwell & Harwood, for appellee.

JOSEPH FRAZIER v. COMMONWEALTH.

Criminal Law—Homicide—Instructions—Malice Aforethought.

An intentional killing does not necessarily imply the crime of murder. A killing in self-defense, for instance, would be an intentional killing, and yet not wrongful in the eye of the law. A pre-determination to do a wrongful act without lawful excuse, is not, of necessity, that malice aforethought which is an essential element in the crime of murder.

Instructions Construed Together.

Instructions in a murder case should be construed together, and where one, if standing alone might be error, when considered with others given may not be erroneous. Where, taking all instructions given together, they fairly construe the law of the case, a judgment will not be reversed on account of one of them being erroneous when construed alone.

APPEAL FROM ANDERSON CIRCUIT COURT.

November 21, 1878.

OPINION BY JUDGE HINES:

Appellant having been convicted of the wilful murder of Joseph Hanks, and his punishment fixed at confinement in the penitentiary for life, he appeals to this court. Among the alleged errors of the court below, upon which a reversal is asked, is the granting and the refusal to grant certain instructions.

The facts upon which the instructions were based are briefly these: On the 21st of February, 1878, Joseph Hanks was standing in the front door of the grocery of B. L. Cox, in the town of Lawrenceburg, engaged in conversation, when appellant, coming from the opposite side of the street, passed by Hanks and went to the rear of the store, where there was a bar, and took a drink. The evidence shows that Hanks accosted appellant, as he passed going to the rear of the store, with, "How are you, Joe?" to which appellant made no response. While appellant was in the back part of the store, Hanks went some six feet into the front part, and was resting with his elbows on the show-case as appellant came back in the direction of the front door, having his right hand in his coat pocket. When appellant got opposite to and in front of Hanks, he stopped and said to him, "Haven't I always treated you as a gentleman?" to which Hanks responded, "Haven't I always treated you the same way?" to which appellant replied, "No, you treated me like a dog yesterday," to which Hanks replied, "You say I did?" and started toward the front door, appellant moving in the same direction. When Hanks had about reached the door, with appellant three or four feet in the rear, appellant drew a pistol from his coat pocket, and shot Hanks in the back, who fell out on the pavement. Appellant then fired two or three more shots at Hanks, while standing over or near him. One of the witnesses says that when Hanks fell and appellant was attempting to shoot him again, Hanks said, "Don't, Joe, you have killed me already." No weapons were found on Hanks, and there is no evidence that he had any at the time of the shooting. Mary Maddox states that shortly after the shooting, after appellant had surrendered himself and was confined in the jail, she heard him say, "Leftar, I promised God yesterday if ever Joe Hanks spoke to me again, I would kill him, and I have done it."

The evidence that there was some difficulty between appellant and Hanks on the day before the killing, but so far as appears they did not come to blows. It also appears that on the evening preceding the killing Hanks had threatened to take the life of appellant, and

that these threats were communicated to appellant the same evening. The evidence also discloses that there had been a difficulty between these parties in 1875; that both were armed; that Hanks drew a pistol; and that they engaged in a struggle, but were separated without serious injury to either and without any shots having been fired. The evidence does not show the origin of this difficulty, nor by whom begun or provoked; but whatever it may have been, the difficulty was adjusted a year or two before the killing, and the parties had become apparently friendly.

It is objected that the law of self-defense was not properly given to the jury by the court below. Among the many instructions given upon this point, all of which we think are homogeneous, the most comprehensive is one given at the instance of counsel for appellant, and is as follows: "If the jury believe from the evidence that the defendant, Frazier, was without fault, and he believed and had reasonable grounds to believe that the decedent, Joe Hanks, intended to and was about to take his life, or to do him great bodily harm, and he had no other apparently safe means of securing himself from the then impending danger, he had the right to use such means as were necessary to prevent the decedent from taking his life, or committing upon him great bodily harm, even to the taking of decedent's life."

The other instructions upon this point say that the danger that would justify the killing must have been such that the killing "was necessary or apparently necessary to protect himself from death or great bodily harm, there and then about to be immediately inflicted upon him by Hanks, and from which there was to him no other apparently safe means of escape than the killing of Hanks." The words objected to in these instructions are: "there and then about to be immediately inflicted." Counsel for the appellant insist that these instructions are in conflict with the law of self-defense as laid down in *Phillips v. Commonwealth*, 2 Duv. 328; in *Young v. Commonwealth*, 6 Bush 312; in *Bohannon v. Commonwealth*, 8 Bush 481; and in *Holloway v. Commonwealth*, 11 Bush 344. This court, in *Kennedy v. Commonwealth*, 14 Bush 340, in commenting in these cases and in reference to instructions containing similar language says: "There is nothing in what is said of either class which conveys the idea that the killing will be excused unless the danger exists, or on reasonable grounds is believed to exist, at the moment of striking the fatal blow." It appears to us that the instructions in

this particular conform to the law as expounded in those cases, and that it is unnecessary to elaborate the reasons therein so fully set forth.

It is also claimed that the court erred to the prejudice of the appellant in the definition of wilful, and of malice aforethought, contained in the first instruction. There it is said that "a wilful killing is an intentional and not an accidental killing," and that "by the term malice aforethought is meant a premeditation in the mind to do a wrongful act without lawful excuse, and it is not material how recently before the act such determination is formed."

It is clear that if these definitions are unaided by the other instructions in the case they are misleading, and might be highly prejudicial to the appellant. An intentional killing does not necessarily imply the crime of murder. A killing in self-defense, for instance, would be an intentional killing, and yet not wrongful in the eye of the law. A predetermination to do a wrongful act without lawful excuse is not, of necessity, that malice aforethought which is an essential element in the crime of murder. It must be a predetermination to kill, and that intention must occupy the mind at the time of the killing.

In the second instruction it is said, "If Frazier wilfully and with malice aforethought killed Joseph Hanks," and in the third and fourth instructions the language is, "If he wilfully shot and killed Hanks." The fourth instruction granted at the instance of the appellant's counsel reads: "A killing, to constitute murder, must be done unlawfully, and unless it be unlawful it cannot have been done with malice aforethought, although it may have been premeditated."

We think these instructions, when considered together, present the law with sufficient clearness to render it morally certain that the jury could not have been misled to the prejudice of the appellant. The jury are told that the killing must have been intentional, it must have been predetermined, and it must have been unlawful. There is nothing in the instructions, when taken together, that could possibly lead the jury to determine that a previous malice, not existing at the time of the killing, would authorize a conviction.

Objection is made that the court erred in refusing to give instruction "6," asked for by appellant. That instruction in substance tells the jury that if appellant, at the time of the killing, had reasonable grounds to believe and did believe that Hanks was about to take his life, or to do him great bodily harm, and that there was no other

apparently safe means of securing himself from the impending danger, he had the right to take the life of Hanks, and that notwithstanding the fact that the grounds upon which appellant acted did not exist, and that he was in fact in no actual danger at the hands of Hanks. This view of the law we think is most clearly presented in several of the instructions given in the case. In the instructions given, the right of appellant, in self-defense, to take the life of Hanks, is based, not upon the actual existence of immediate danger to his own life, but upon his belief founded upon the appearances of danger. The law upon this point having been fully and clearly presented in other instructions, the instruction refused could not have served a beneficial purpose, and was therefore properly rejected. *Kennedy v. Commonwealth*, 14 Bush 340.

It is also insisted that the court below erred in refusing to grant a new trial upon the grounds of partiality and prejudice, shown to have existed in the minds of the jury. There is evidence in the record conducing to show that after the trial it was ascertained that one of the jurors had said, prior to his being sworn as a juror, that the appellant was guilty. The question of the competency of this juror was not raised, as in fact it could not have been, until the motion for a new trial was made. As has been held by this court in *Kennedy v. Commonwealth*, 14 Bush 340, and in *Terrell v. Commonwealth*, 13 Bush 246, we have no power to reverse for an error of that nature, as the decision of the court upon a motion for a new trial is not subject to exception. Secs. 281 and 282, Criminal Code.

Judgment affirmed.

John Rodman & J. W. Rodman, for appellant.

Harlin Cohen, C. A. & P. W. Hardin, T. E. Moss, for appellee.

MARY J. EWING v. CALEB B. BRYANT.

Rescission of Contract—Recovery for Use and Occupation.

Where in a contract to trade real estate one of the parties takes possession under the contract and has the use of the land for two years, and the contract is rescinded by a judgment of the court, the owner may recover the value of said use and occupation less the value of lasting improvements made thereon.

APPEAL FROM DAVIESS CIRCUIT COURT.

November 22, 1878.

OPINION BY JUDGE ELLIOTT:

Appellant exchanged a tract of twenty-eight and one-half acres of land near Owensboro for a lot in Owensboro, with appellee and his partner Jones. By the contract of exchange Jones and Bryant were to erect a house of certain dimensions on the exchanged lot and pay appellant some boot.

Appellant conveyed the tract of land to appellee, and his partner and appellee prove that he conveyed the house and lot to her, but no deed is exhibited.

After the completion of the house appellee and his partner tendered to appellant the house and lot, which she refused to accept and receive on the ground that the house had not been built according to the contract, and on appellant's action for rescission of the contract and after a litigation which lasted two or three years the appellee and his partner withdrew their answer and a rescission of the contract was adjudged in appellant's favor.

The appellee and Jones having received the possession of the tract of land deeded to them by appellant in 1872, and having used and cultivated it some two years, she brought this suit for such use and occupation against appellant, his partner Jones having died.

To this action appellee set up as a defense an agreement made at the rendition of the judgment of rescission that the judgment of rescission was to be a final settlement of all matters growing out of the contract of exchange of land between the parties and also set up as an off-set the value of the use of the house and lot exchanged for appellant's tract of land, and alleged that he built the house according to the contract and tendered it to appellant, and by her refusal to receive it he had been deprived of the use of it for two or three years. He alleged in addition that he had, while in possession of appellant's tract of land, made lasting and valuable improvements on it to the value of \$100.

The charge that appellant's claim for the use and occupation of the land while in appellant's possession was compromised, and that she agreed to assert no such claim when the judgment of rescission was rendered, is not sustained by the evidence. Appellee proves that his attorney told him that such an understanding was had with appellant, and his attorney swears that the judgment of rescission was to settle all matters in dispute about the trade, as he understood from appellant, her attorney, or somebody else that he thought had authority to speak for her; but he does not remember with whom his

understanding was, and if he could name the person appellant might be able to prove that he had no authority to speak for her.

The claim for rent of the house and lot agreed to be exchanged with appellant for her tract of land must be considered as *res adjudicata*. By the judgment of rescission the court decided that appellant was never bound by her contract of exchange, which was in effect deciding that she rightly refused to receive either the possession or title to the house and lot then in dispute.

As appellant never occupied the house and lot the appellee can only claim the value of the use of it by sustaining the validity of the contract of exchange made with appellant, and as the court decided that she was not bound by the rescinding of that contract it must be regarded as conclusive between the parties.

The claim for improvements is sustained. The evidence conduces to prove about one hundred dollars' worth of improvements made on the land of appellant while in possession of Bryant and Jones, and it also conduces to prove that appellee and Jones enjoyed the possession and rents and profits of appellant's land for about two years, and that the fair value of the use of the land is one hundred dollars per year.

The claim by the appellee that the judgment of rescission is a bar to this action is not sustained by that record. In that suit appellant set up no claim for the rents or use and occupation of the land, for the occupation and use of which she brings this suit. She sued for and obtained a rescission for alleged fraud.

The appellant is entitled to one hundred dollars for each crop season that her premises were occupied by appellee and Jones, subject to an off-set of one hundred dollars for lasting valuable improvements made on the premises during such occupation, and the court below will adjudge accordingly.

Wherefore the judgment is *reversed* and cause remanded for further proceedings consistent with this opinion.

Little & Slack, for appellant. Owen & Ellis, for appellee.

S. B. ROLLINS, ET AL., v. WILLIAM BALLENTINE.

Property Right in Judicial Decisions.

Where there has been a long line of judicial decisions, even though such decisions upon principal are erroneous, the public who have bought, sold and owned property thereunder secure a property right therein, and such rules should not be changed by the judiciary, except for very urgent reasons.

APPEAL FROM BALLARD COURT OF COMMON PLEAS.

November 23, 1878.

OPINION BY JUDGE COFER:

It seems to have been the doctrine of this court since *Webb v. Holmes*, 3 B. Mon. 404, was decided, and such seems to have been the rule of the common law from a very early period in its history, that one not a party to a deed cannot take a present interest under it, but that those not parties may take under it by way of remainder. *Foster v. Shreve*, 6 Bush 519. And in *Turner v. Patterson*, 5 Dana 292, it was held that a devise to Kathrine Patterson and her children was prima facie to the children then in being, and that after-born children would take nothing, but the court, anxious to effectuate the supposed intention of the testator, seized upon a very slight circumstance to hold that it was the intention to give Mrs. Patterson a life estate, and to the children the remainder, and thus brought the case within the rule stated in *Webb v. Holmes*, that though not parties to the deed they could take under it in remainder, and the same thing, in effect, was held in *Foster v. Shreve* as to the "present heirs" of Mrs. Rogers.

There is, we admit, some difficulty in understanding what substantial reason can exist for the rule which allows persons not parties to a deed to take under it in remainder, and yet refuses to allow them, although ascertained by the deed itself, to take a present interest. And it is also difficult to understand why a remainder will open to let in after-born children, when an absolute fee will not. It would seem that if the intention of the grantor is to be the sole guide in interpreting the conveyance, the same reason that would let in to share a remainder one not a party to the deed or in esse when it was made, ought also to let in such persons to share an absolute fee, if such were clearly the intention of the grantor.

But experience has proved that it is often more important that legal rules should be stable and uniform, than that they should be right. These rules, however difficult, or even though it be impossible to discover any satisfactory reasons upon which they are based, have become rules of property in this state, and cannot, with safety or with justice, be now overthrown by the action of the courts.

Men have bought and sold on the faith of them, and to overturn them now by the ex post facto action of the courts would, while doing justice to one class of persons, do equal injustice to another

equally large and equally entitled to the consideration of the courts.

We entertain no doubt but that J. P. Edwards, the grandfather of these appellants, intended that all the children of E. R. Edwards, whether born before or after the date of the deed, should share his bounty, but not having taken such precautions to carry his intention into effect as the law required, that intention must fail.

Appellant's counsel cite *Powell v. Powell*, 5 Bush 619; *Gill's Heirs v. Logan*, 11 B. Mon. 231; and *Cessna v. Cessna's Adm'r*, 4 Bush 516, in support of the contrary view.

In *Gill's Heirs v. Logan*, *supra*, the question here involved was only incidentally referred to, and in that connection the court cites approvingly *Turner v. Patterson*, in which, as we have already seen, it was said that the law would on the language of the devise restrict the right to the children who were in being at the death of the testator, and the after-born children were only let in by holding the devise to be to Mrs. Patterson for life with remainder to her children.

We have examined the record of *Powell v. Powell*, *supra*, and find the deed there construed was made March 18, 1851, and that Harriett Louisa Powell was born October 12 of that year, so that if she could be regarded as then in being so as to be capable of taking as purchaser, one-half of the difficulty is over. But that she was not a contracting party, and could not, according to the cases of *Webb v. Holmes* and *Foster v. Shreve*, take under the deed, still remains to antagonize that case with former decisions of this court.

In *Cessna v. Cessna's Adm'r*, *supra*, the question here made was not involved. That was a contest between all the children of W. W. Cessna on one side, and his creditors on the other. True, if the after-born children had been excluded, the interest of their father subject to the payment of his debts would have been larger, but that view of the subject was not called to the attention of the court, and from the opinion does not appear to have been considered. The sole effort of the appellee's counsel in that case, as stated in the opinion, seems to have been to have it adjudged that the children took nothing.

The judgment conforms to the views expressed herein, and therefore it is *affirmed*.

Crossland & Melton, for appellants.

Marshall & Love, Bugg & Bishop, for appellee.

ANNIE PEARCE *v.* S. B. THOMAS'S EX'RS, ET AL.**Contract for Services Rendered by a Relative.**

No promise to pay for services rendered by a relative residing with a relative can be implied, but there must, to entitle one rendering such services to recover, be a contract to pay.

Consideration for Services—Contract.

A contract between relatives, by which one residing with the other does not perform menial services, but gives her time in aiding the other, and as a companion, is based upon a sufficient consideration.

APPEAL FROM LOUISVILLE CHANCERY COURT.

November 27, 1878.

OPINION BY JUDGE PRYOR:

The right of the appellant to recover depends alone upon the existence of a contract between herself and the appellee's intestate in regard to her services.

This contract is established by the testimony of both the father and mother of the appellant, and their statements corroborated by others who were familiar with the family of the decedent, and in a condition where it is not at all improbable that they should have heard the parties talk as to the terms on which appellant was remaining at the house of her father-in-law. The evidence by the appellee that appellant performed no menial services, and did not act in the capacity of servant, and was absent much of the time, did not conduce to disprove the existence of the contract or defeat appellant's right of recovery. It is not pretended that appellant was a mere servant, or that she in fact undertook to perform that character of services that would entitle her, independently of the contract, to the sum claimed. Appellant was the daughter-in-law of the decedent, who was a man of wealth, with a wife in bad health, and desired that appellant should remain with her and in the family more as a companion for the wife than as a servant, and in consideration of the agreement to remain or make their house her home, decedent agreed to give her fifty dollars per month, so long as she remained a widow, or so long as she continued to reside with decedent. That she was kind and attentive to the wants of her mother-in-law, and after her death to the decedent, is clearly shown, and this attention entered into and constituted, as is alleged in the petition and as the proof shows, a part of the consideration for the agreement.

This is no contract in restraint of marriage, and as we construe the statements of the petition, the meaning was that when she ceased to be a widow her right to pay terminated. If, however, this consideration is contrary to public policy and therefore void, it by no means follows that after the services are performed and the contract complied with that the appellee or his intestate could say, "Although you have complied with your contract, remained at my house and nursed myself and wife as you agreed, still we are not liable, because a part of the consideration was illegal." This, however, forms no part of the contract. The object of the decedent was to have appellant reside with him as one of the family, and to bestow that attention to his wife that one with her relation to the family would naturally give. That appellant was absent much of the time, or occasionally visited her friends, does not affect the nature of the contract or limit her right of recovery; as before stated the ordinary duties of servant was not expected of her, and the right to enforce the contract is not made to depend upon her rendering such character of service. She continued to render service such as she was expected to render up to the 1st of August, 1874, and up to that time she is entitled to receive, subject to the payments made. The contract is not within the statute of frauds. A contract to pay \$50 per month as long as one remains a widow or as long as the services are rendered is not within the statute.

Judgment *reversed* and cause remanded for further proceedings consistent with this opinion.

D. M. Rodman, Kinney & Renard, William Wilson, for appellant.

M. H. Marriott, Barrett & Brown, for appellees.

RUTH DOWNEY v. JAMES W. URTON.

Easement—Trespass—Adverse Possession.

One who has continuously used and claimed the right to use an easement or passway for more than twenty years has the right to remove obstructions placed therein, and cannot be held liable for trespass for doing so.

APPEAL FROM JEFFERSON COURT OF COMMON PLEAS.

November 27, 1878.

OPINION BY JUDGE ELLIOTT:

Appellee's father claimed a passway from his premises to the turnpike running from Louisville to Shelbyville in this state. Appel-

lants, in 1876, enclosed this passway by a fence, and appellee, as the agent and employe of his father, removed the fence that obstructed the passway. Appellants treated the removal of the fence as a trespass and brought this suit before a justice of the peace and having been successful, the appellee appealed from the justice's judgment to the court of common pleas of Jefferson county, where he was successful, and from the judgment in his favor the case is here on appeal. The first question made is as to the jurisdiction of the justice's court to try the issues made before it.

By a special statute applicable alone to the county of Jefferson, its justices of the peace have jurisdiction of all matters of litigation where the amount in dispute does not exceed one hundred dollars, exclusive of interest and cost, except where the title to land is involved in the litigation.

By this suit the defendant is accused of breaking the plaintiff's close by his unlawful entry thereon, and of throwing down their fence and hauling over their rye, oats, etc. The defendant denied that he broke the plaintiff's close or entered on their premises, and the plaintiffs, to show that the land on which defendant was accused of having trespassed belonged to them read their evidences of title to the jury.

We regard it extremely doubtful whether the justice had jurisdiction in such a case as this. If the plaintiffs had asserted that they were in the actual possession of the land on which they alleged the defendant had committed the trespasses, then they could have maintained their action without showing title; but they did not rely on possession as the foundation of this action by charging that their possession had been invaded, on the contrary the foundation of this action is that the plaintiffs were the owners of the land, and that defendant had broken the close by making an unlawful entry thereon.

Trespass under our laws to land can be maintained without proof by plaintiff of actual possession of the land on which the trespass was committed, and as the plaintiffs chose to put their title in issue, we are inclined to the opinion that the court in which such issue was made had no jurisdiction to try it. But waiving the further consideration of this question we are of opinion that on the trial of the issues in the court of common pleas no errors were committed prejudicial to the rights of the appellants.

The case was fairly submitted to the jury on its merits. The defendant, Urton, claimed that his father had used and claimed the

right to use the passway on which he had been accused for more than twenty years by continuous use of the same, and that he entered on plaintiff's land and removed obstructions placed in this passway only and did this by his father's permission, and as his agent and employe, and there was no evidence conducing to disprove this defense.

The appellants, who were plaintiffs in the court below, complain of the court's refusal to give their instructions. It seems that the court refused to give the instructions asked by both the plaintiffs and defendant, but instead gave what he conceived to be the law of the case to the jury, and these instructions we regard as a fair presentation of the rules of the law applicable to the issues made and the evidence adduced in their support.

Whatever may be the legal rule in other states as to the acquisition of the right to the use of a passway, the decisions in the cases of *Bowman v. Wickliffe*, 15 B. Mon. 84, and *Hall v. McLeod*, 2 Met. 98, have settled the rule in Kentucky.

According to these decisions, if there is a passway over a man's land which his neighbor has used, not by his permission merely but under a claim of right for more than twenty years, then such neighbor has a right to continue to use the passway, and it becomes unlawful to obstruct it or hinder his use of it.

The evidence in this case conduces to prove that the father of appellee has been using the passway in dispute for forty-odd years, and that in a conversation between him and one of these plaintiffs he was informed that he had a right to the use of the passway. The fact that the plaintiffs and their ancestors had in fencing their lands left this passway, by fencing on each side of it, thus making it a lane, and that it had been used publicly by appellee's father for some forty years, and the fact that one of the plaintiffs conceded his right to the passway together with the other facts in evidence, authorized the verdict which was made by the jury, and the judgment appealed from.

Wherefore the judgment is *affirmed*.

W. R. Abbott, W. C. Whittaker, for appellant.

Harrison & McGraw, for appellee.

JOHN BENTON *v.* JOHN LEMMERICK.**Conveyance by Husband and Wife—Waiver of Homestead.**

When a husband and wife join in a conveyance of the whole estate without limitation either in the deed or certificate of acknowledgment, the same amounts to a waiver of the homestead right.

APPEAL FROM OHIO CIRCUIT COURT.

November 30, 1878.

OPINION BY JUDGE ELLIOTT:

On the 28th day of October, 1874, appellants, Benton and wife, executed their promissory note to the appellee for the sum of \$1,500, due one year after date, with interest from date, this sum being loaned to them at that time; and to secure its payment they executed a mortgage to the appellee of a tract of land described in the mortgage copied in this record. This deed conveys, by way of mortgage, all the interest of the appellants in the land embraced by the conveyance, and the only question is as to whether the homestead passed by the deed to the vendee. In *Wing v. Hayden*, 10 Bush 276, and in *Robbins v. Cookendorfer*, 10 Bush 629, this court decided that whenever the husband and wife join in a conveyance of the whole estate, without limitation either in the deed or certificate of acknowledgment, the same amounts to a waiver of the homestead right.

As, therefore, the appellants conveyed to the appellee in mortgage their entire estate in the land, the homestead right passed to the vendee, and as the lower court so adjudged that judgment is hereby affirmed.

Walker & Hubbard, A. Duvall, for appellant.

William Lindsay, W. F. Gregory, for appellee.

JOSEPH SEAL & WIFE *v.* JOHN GILBERT'S ADM'R, ET AL.**New Trial—Irregularities.**

Mere irregularities are not grounds for a new trial after the expiration of the term at which a judgment is rendered.

Newly Discovered Evidence.

Where a motion for new trial is based on newly discovered evidence it is not sufficient to show that such evidence is material or even decisive, but it must be shown that such evidence could not, with reasonable diligence, have been discovered and produced on the trial.

APPEAL FROM OWSLEY CIRCUIT COURT.

December 3, 1878.

OPINION BY JUDGE COFER:

In a case like this, mere irregularities are not grounds for a new trial after the expiration of the term at which a judgment is rendered. If the pleadings or proof were deficient, the remedy was by appeal to this court, and not by a petition for a new trial. Secs. 373-579, Myers's Code.

The only ground attempted to be set up in the petition, which could authorize the court below to grant a new trial after the term, was that new evidence had been discovered after the expiration of the term. But it was not sufficient to show that such evidence as was material, or even decisive, had been discovered. It was necessary to show that it could not "with reasonable diligence" have been discovered and produced on the trial. Sub-sec. 369, Myers's Code.

The appellee not only fails to show that he could not, by reasonable diligence, have discovered the evidence now claimed to be newly discovered, in time to produce it on the trial, but he shows affirmatively that he could have discovered it if he had sought for it. True, he alleged that he could not have discovered it, but other allegations show that this is not true. He says there was no counsel in the case after the death of his intestate to represent the interest of his estate. He does not pretend to have made any search in the county clerk's office, to see what his intestate had done with the estate of William Gilbert, deceased, until after the judgment was rendered against him. He seems then to have been aroused to the necessity of giving some attention to the case. He employed an attorney and set about the work he should have attended to years before, and in less than three months afterward, had all the facts necessary to a complete defense, as he alleged. That he found the papers without the aid of indexes to the county court records, or labels on the bundles of settlements, after judgment, proves conclusively that he could have found them before if he had chosen to cause search to be made. He does not claim that he was ignorant until after the trial, that his intestate had made settlement, or give any reason why he did not make the search sooner, except that he had no attorney, which in a case like that was of itself inexcusable negligence. He had no right to be, in silence and without, as far as appears, making the slightest effort to protect the interest of the estate committed to his hands,

until a judgment was rendered against him, and then to ask the court to relieve him by granting a new trial, to enable that to be done that might have just as well have been done years before.

The judgment granting a new trial was a final order. It ended that action, and may be appealed from. *Allen v. Perry*, 6 Bush 85; *McCall v. Hitchcock*, 7 Bush 615.

Judgment *reversed*, and cause remanded with directions to dismiss the petition.

S. Ensworth, for appellants. A. J. & D. James, for appellees.

C. A. SKILES *v.* TRUSTEES OF RICHPOND.

Dedication to Public Use.

It is necessary to a dedication to the use of the public that there should not only be a clear indication of an intention to invest the public with a right to use the property, but it must also appear that the dedication was accepted on the part of the public by some one authorized to act for it.

Proof of Dedication.

Proof of dedication and acceptance may be by facts or circumstances sufficient to authorize an inference of the intention to give or to accept.

APPEAL FROM WARREN CIRCUIT COURT.

December 4, 1878.

OPINION BY JUDGE COFER:

It is necessary to a complete dedication to the use of the public that there should not only be a distinct and clear indication of an intention on the part of the proprietor to invest the public with a right to use the property, but it must likewise appear that the proffered dedication was accepted on the part of the public by some one authorized to act for it. *Gedge v. Commonwealth*, 9 Bush 61.

It is as necessary to a valid dedication that there should be two parties, one to make and another to receive, as that there should be two parties to a deed of conveyance.

It is not necessary that the intention of one to make or of the other to accept a dedication should be evidenced by writing. Either may be proved by facts or circumstances, which are sufficient to authorize an inference of the intention to give or to accept. What acts on

the part of a corporation will authorize the court to infer an acceptance must depend upon the peculiar facts of each case, and no general rule on the same subject can be safely promulgated.

No doubt Skiles is estopped, by conveyances made by him in which the property conveyed is described as lying in a designated street or alley, to dispute in a contest with his grantee that the street or alley called for exists. But no such estoppel exists in a contest between him and the public. His recitals do not bind the public to accept and keep in repair anything he may choose to call a street, and consequently the fact that he so called it does not estop him in a contest with the public to deny that it is a street. The plan not having been recorded or presented to the trustees and accepted by them as a plan of the proposed town, the only effect it can have, and the only effect the recitals in the deeds can have, in this case, is as evidence of a dedication, and as such they are not sufficient. The extent and character of the ground embraced by the plan when compared with the population forbid the conclusion that either Skiles or the trustees intended that the vast net work of streets and alleys embraced in the plan should become public highways to be opened and kept up by a town with a population of less than one hundred.

The more reasonable conclusion is that both parties expected that streets would open and be dedicated as the demands of population and business might require, and that they alike trusted to the developments of the future to shape their action on that subject.

Skiles' interest as proprietor of the lots might safely be relied on to provide streets as they should be needed. He has never recognized Reed street in any way except by allowing it to be laid down on the map; he has never sold a lot on it, except to Dr. Cartright, and in that instance refused to recognize it as a street.

The demands of population and business are not sufficient to require it to be opened, and in view of the circumstances of the case it would be unreasonable to conclude that there has been a dedication and acceptance of that supposed street. If that is a street and may be opened by the trustees, then all in the plan may also be opened, and to suppose that either party intended that this should or might be done at the pleasure of the trustees is to suppose that they acted without the motives which generally control the actions of men.

The spring or well referred to as in or near Reed street is not laid down on the map, and there is not the slightest evidence that it

was intended to be dedicated to the public except the fact (if it be a fact) that the spring is in the street, and that fact can add nothing toward proving either an intention to dedicate the street or an acceptance on the part of the town. But the preponderance of the evidence is that the spring is not in the street as laid down on the map, and consequently that if it were opened the inhabitants of the town would not thereby have access to the spring.

So far as Reed's property is concerned (and there seems to be no other not owned by Skiles that would be benefited by opening Reed street) it was purchased and improved long before the plan of the town was made, and without reference to it; and besides no wrong done to him as an individual can affect the decision of the case now before us.

Judgment *reversed* and cause remanded with directions to dismiss the petition.

Wright & McElroy, for appellant. J. M. Taylor, for appellees.

JOSEPH McDOYLE *v.* COMMONWEALTH.

Criminal Law—Evidence—Confession.

Where a confession of crime is induced by fear it is not admissible in evidence, and if the officer said to the accused after arrest that "You had better confess it," and the prisoner, being a timid and weak minded person, construed this as a threat and made a confession, such confession should not be admitted in evidence.

APPEAL FROM CARTER CRIMINAL COURT.

December 6, 1878.

OPINION BY JUDGE HINES:

The evidence strongly conduces to the conclusion that the appellant is timid and of weak mind and that the confession made by him to Boggs, immediately after the arrest was induced by fear. It is true that Boggs only said to him, "you had better confess it"; but if the prisoner construed this as a threat, as he well may have done, the confession should have been excluded. Nor do we think it material whether Boggs had a warrant or not, nor even whether he was in fact an officer, provided the confession was made through fear and under the belief on the part of appellant that he was legally in custody. The confession made in the presence of Campbell appears

to be competent, but that does not cure the error in the admission of the confession to Boggs. The common law attaches but little weight to confessions made out of court, and our code is emphatic that, standing alone, they will not authorize a conviction.

We see no objection to the instruction given by the court, and no error in the refusal to grant the instructions asked for by appellant. As to whether there was any evidence to corroborate the confession was a question for the court, and not for the jury. If there had been no evidence except the confession going to show that the offense had been committed, it would have been the duty of the court to instruct the jury to find for the defendant; but such evidence being before the jury, it was improper to give the jury any instruction in reference to corroborative evidence. They were to determine the guilt or innocence of the accused from all the facts and circumstances proved in the case, and in doing so the weight to which the confessions or any other fact proved was entitled was a matter entirely for them to decide.

The indictment, according to the ruling of this court in the case of *McBride v. Commonwealth*, 13 Bush 337, is good, and the court did not err in overruling the motion in arrest of judgment.

For the reasons assigned the judgment is *reversed* and cause remanded with directions to award appellant a new trial, and for further proceedings consistent with this opinion.

J. R. Botts, for appellant. Moss, for appellee.

THOMAS G. SOWARDS, ET AL., *v.* COMMONWEALTH.

Suit to Set Aside Conveyance—Consideration of Conveyance.

The recital in a deed that it was founded on a valuable consideration is good and binding between the parties to it, but is no evidence that such consideration has been paid in a contest between a stranger to the conveyance and the parties to the deed.

APPEAL FROM PIKE CRIMINAL COURT.

December 6, 1878.

OPINION BY JUDGE ELLIOTT:

Thomas G. and John W. Sowards entered into a recognizance for the appearance of Thomas Maggard in the Pike Criminal Court at its September term, 1876, to answer a charge of grand larceny, and

John W. Sowards entered into a like recognizance for the appearance of Martin Sowards at the same time to answer a charge of grand larceny. The first recognizance was for \$400 and the second for \$700.

Neither Maggard nor Martin Sowards appeared at the time specified in the two recognizances, and they were forfeited and judgments obtained against Thomas G. and J. W. Sowards at the March term of the Criminal Court, 1877.

This suit was brought against Thomas G., J. W. and Jefferson Sowards, with a view to set aside some conveyances made by Thomas G. and John W. Sowards to Jefferson Sowards for fraud, and an attachment was raised and executed in the case.

Appellants, Thomas G. and John W. Sowards, conveyed several tracts of land to Jefferson Sowards on the 1st of September, 1876, and these conveyances being attacked as having been made with the fraudulent intent to cheat, hinder and delay creditors, the case was submitted without any evidence to the court, and he adjudged the conveyances fraudulent.

As there was no evidence that Jefferson Sowards obtained either of the deeds for a valuable consideration, coupled with the admitted fact that neither Maggard nor Martin Sowards appeared at the court in discharge of their cognizances, and the further fact that these deeds were made just before the term to which they were recognized to appear, authorized the judgment. The recital in these deeds that they were founded on a valuable consideration was good and binding as between the parties, but was no evidence that such consideration had been paid in a contest between a stranger to the conveyances and the parties to the deeds. *Goins v. Allen*, 4 Bush 608.

But John W. Sowards alleged that all the land in dispute in this litigation adjoined and constituted one tract, and that he resided thereon and was a housekeeper with a family, or at least we think his averments amount to such an allegation, and if so it was error in the court to adjudge that all the lands in dispute should be sold in satisfaction of the appellee's judgments, as in this class of cases the appellant is entitled to the benefit of the homestead exemption law, as decided by this court in the case of the *Commonwealth v. Lay*, 12 Bush 283.

The appellant having alleged that he was a housekeeper with a family, and that he resided on the land in dispute, and the appellee

having failed to deny this affirmative allegation as is required by Section 112 of the Civil Code of 1877, it should have been taken as true, and the court should have directed that a homestead be set apart to John W. Sowards, and the remainder should be sold in satisfaction of appellee's judgments.

Wherefore the judgment is *reversed* and cause remanded for further proceedings consistent with this opinion.

James M. York, for appellants. Moss, for appellee.

T. B. TALBOTT v. COMMONWEALTH.

Criminal Law—Insanity of Accused—Burden of Proof.

Where a defendant in a criminal prosecution had been adjudged insane by a judicial inquiry shortly before the commission of the offense charged against him, and this is shown by the evidence, the burden of showing the sanity of the accused is on the prosecution, and it must prove that mental derangement had ceased to exist.

APPEAL FROM FAYETTE CIRCUIT COURT.

December 7, 1878.

OPINION BY JUDGE PRYOR:

It appears from the evidence in this case that the accused had been adjudged to be of unsound mind by proper judicial inquiry but a short time before his conviction of the offense of which he now complains, that he was sent to the asylum for lunatics, and made his escape therefrom.

The evidence of the man's mental condition, when once established, as it seems to have been done in this case, placed the burden of showing the sanity of the accused on the prosecution, and it was with the commonwealth to prove that this mental derangement had ceased to exist. The jury should have been told that upon the facts of this case it devolved upon the commonwealth to satisfy them by a preponderance of the testimony that the accused, at the time he is charged with the commission of the offense, was of sound mind, such a mind as enabled him to know right from wrong, with sufficient power of self-control to govern his action, and resist the temptation to do wrong.

Judgment *reversed* and cause remanded for further proceedings consistent with this opinion.

Houston & Mulligan, for appellant. Moss, for appellee.

MATTHEW CURRENT & Co. v. PATRICK DROHAN.

Damages—Negligence.

One operating a threshing machine, who mixes coal oil with lubricating oil and uses the same to oil the machinery and thereby caused the machinery to take fire from its own friction, and burned plaintiff's wheat, is so far negligent that a verdict against him will not be disturbed.

APPEAL FROM HARRISON CIRCUIT COURT.

December 10, 1878.

OPINION BY JUDGE ELLIOTT:

Appellants contracted with appellee to thresh his wheat with their threshing machine propelled by steam. After their commencement of the job, and after about sixty-five or seventy sacks of wheat had been threshed, the machine and all the unthreshed wheat were consumed by fire.

It seems that the lubricating oil that appellants had been using on their machinery was about to give out, and they obtained some coal oil, which they mixed with it, and after using this new lubricating preparation for a short time the machinery, as is contended by appellee, from its own friction took fire and consumed his wheat.

It is contended for appellants that one of the instructions given by the court authorizes the jury to find for the appellee, if they believe certain facts, without informing them that they must so believe from the evidence adduced on the trial. It is usual and proper to instruct the jury that their belief of any fact which is the subject of inquiry must be founded on the evidence which they have heard on the trial; but when it is considered that all the other instructions inform the jury that their belief of the facts must result from the evidence we cannot see how the omission in this instance could have prejudiced the appellants.

In other words, the jury were substantially told that their finding must be founded on the evidence which they had heard on the trial, and the omission to repeat such direction in one of the instructions could not have prejudiced appellants' rights, as there was no man, as we must presume, on the jury who did not know that he was trying the case according to the evidence adduced on it. On the merits of this case we have to say that we can find no fault with the instructions, and as the evidence was conflicting, but conducted to prove

the appellee's cause of action, we cannot interfere with the verdict of the jury.

The main question was whether appellants had been guilty of negligence in the use of coal oil as a lubricating oil in threshing appellee's wheat, which by the heat engendered by the rapid revolutions of the wheels on the axles caught fire and consumed appellee's wheat, and on this question all the instructions were as favorable to appellants as the law will permit. The court instructed the jury that before they could find against appellants by reason of their use of coal-oil on their machinery they must believe not only that they did so use it, but must further believe that the oil thus used was a dangerous and inflammable oil, and that by the negligent and careless use of it the appellants set fire to and consumed the wheat of the appellees, etc. Although there is a conflict the evidence in this case conduces strongly to the conclusion that coal oil applied in the lubricating of such machinery as a wheat thresher is dangerous and inflammable, and that owing to the rapid revolutions of the wheels of such machinery it is liable to ignite and burn up the machinery, etc., and the evidence is persuasive that the wheat, etc., in dispute in this action, was consumed by such ignition.

Wherefore the judgment is *affirmed*.

W. V. Prather, T. F. Hargis, for appellants.

J. Q. Ward, for appellee.

JOHN K. WILSON v. JOHN GALLAGHER, ET AL.

Legal Diligence.

One has not used diligence who procures a judgment on October 24, and does not cause execution to issue thereon until December 8, unless he can show some good reason why execution was not sooner issued.

APPEAL FROM MERCER CIRCUIT COURT.

December 11, 1878.

OPINION BY JUDGE COFER :

That the appellant's lien on the land was lost unless he prosecuted Gilham to insolvency with proper legal diligence was decided on the former appeal, and is now a concluded question in the case. The only question, therefore, is whether such diligence has been shown.

The judgment was rendered October 24, 1873, and no execution issued until December 8, thirty-five days after it might have been issued. That this, if unexplained, is not legal diligence is clear. *Harnett v. McGarvey & Trice*, 4 B. Mon. 393; *Bard v. McElroy's Adm'r*, 6 B. Mon. 416; *Marr v. Smith*, 7 B. Mon. 189.

The explanation is offered that the attorneys who brought the suit and obtained the judgment had given general directions to the clerk to issue executions on all judgments obtained for their clients as soon as they were due. When those directions were given is not stated; for all that appears it may have been years before. It was the duty of the clerk to do this without being directed and as between the assignee and the assignor such a direction cannot be regarded as sufficient.

In order to hold the assignor liable the assignee must see to it that the executions issue in a reasonable time, or must show that he did all that was reasonably in his power to cause it to issue. If the clerk should refuse or neglect to issue an execution in due time after being specially directed to do so, we are not prepared to say that the assignor would be released by such neglect or refusal, but unless such special directions be given the neglect of the clerk must, as between the assignor and the assignee, be deemed to be the neglect of the latter.

Gilham was in straightened circumstances. He owned a house and grounds encumbered by mortgage; the right of redemption was subject to execution. The amount of the mortgage is not shown, nor the value of the property. He had other property, some of which he mortgaged in June, 1874. It is not certain that the debt, or some part of it, might not have been made by proper diligence, and the court properly adjudged that recourse against the land was lost.

Judgment affirmed.

C. A. & P. W. Hardin, Kyle & Poston, for appellant.

Bell & Wilson, for appellees.

J. A. ROUSE v. S. E. JONES, ET AL.

Mechanic's Lien—Petition in Bankruptcy.

The holder of a mechanic's lien not having brought a suit in the state court to enforce it prior to the defendant's filing his petition in bankruptcy court for his discharge in bankruptcy, he cannot maintain his suit in the state court.

Bona Fide Purchaser—Mechanic's Lien.

A bona fide purchaser without actual or constructive notice cannot be affected by the lien created by the statute.

APPEAL FROM DAVIESS CIRCUIT COURT.

December 11, 1878.

OPINION BY JUDGE ELLIOTT:

Appellant, in the year 1868, furnished lumber to one S. L. Simms with which he built a still-house in Daviess county, and on the 1st day of November, 1869, and within one year from the time he furnished the material, appellant brought this suit to enforce his lien under the mechanic's lien law of Daviess county.

His claim was fully established to the extent of \$381.32. Before the institution of appellant's suit F. L. Simms had filed his petition for a discharge in bankruptcy, and S. E. Jones was appointed his assignee. Jones answered that as such assignee in bankruptcy he had disposed of Simms' property under judgments in the bankrupt court, and on hearing appellant's petition was dismissed and he appeals.

Mr. Bump, in his work on the law and practice in bankruptcy, says, "No lien can be acquired and enforced by any proceeding in a state court commenced after such petition (in bankruptcy) is filed, although jurisdiction which has been previously acquired by state courts of a suit brought in good faith to enforce a valid lien upon property will not be divested."

And in *Brock v. Terrill*, 2 Nat. B. R. 190, it was decided that "the assignment to the assignee is for the benefit of creditors and is not affected by secret unrecorded liens."

The appellant having asserted his lien after his debtor had brought his suit in the U. S. Bankrupt Court for a discharge, it would seem from the authorities that he cannot sustain it in a state court, and as appellant's lien had not been recorded, it seems that it has no existence in the bankrupt court, or at least is unenforcible. Besides, as the record indicates, the bankrupt's still-house and other property had been sold and passed into the hands of innocent purchasers at the commencement of this suit, and if so appellant's lien cannot be enforced against such purchasers.

This court, in *Nunes v. Wellisch*, 12 Bush 363, in speaking of a mechanic's lien, says, in substance, that a bona fide purchaser without actual or constructive notice cannot be affected by the lien created by

the statute. As appellant had an unrecorded lien he cannot enforce it against a purchaser under the bankrupt judgment at a sale made before the bringing of his suit.

For these reasons the judgment below is right. Wherefore the judgment is *affirmed*.

Ray & Walker, for appellant.

A. P. TAYLOR, ET AL., v. JOHN RHODES, ET AL.

Parties to Actions—Church Subscription.

Where a subscription is made payable to a committee for the benefit of the church, the committee is the proper plaintiff in an action to collect. It is not necessary under the code to join the beneficiary as a party plaintiff.

APPEAL FROM GREENUP CIRCUIT COURT.

December 12, 1878.

OPINION BY JUDGE PRYOR:

The action of the committee was properly brought, whether under the old or new code. The subscription was made payable to the committee for the benefit of the church and in such cases it is expressly provided by the code that the party in whose name a contract is made for the benefit of another may sue without joining the beneficiary. The pleadings were read and the entire defense of the appellant heard by the court. The subscription was unconditional, and there was proof made by the party obtaining it that such was the contract, although his recollection is indistinct in regard to it. We cannot say that the judgment is palpably against the evidence, although there is a preponderance of proof for the appellant.

The judgment is *affirmed*.

T. F. Dulin, T. H. Paynter, for appellants.

E. C. Phister, J. Davidson, for appellees.

AETNA INSURANCE COMPANY v. W. P. CUNDIFF'S ADM'X.

Bill of Exceptions—Order.

An order permitting a bill of exceptions to be prepared and filed in vacation is void.

APPEAL FROM MEADE CIRCUIT COURT.

December 12, 1878.

OPINION BY JUDGE PRYOR:

The order permitting the bill of exceptions to be prepared and filed in vacation was void, and we have before us for consideration the pleadings only on which the judgment was based. Issue was made on the original petition and the amendment, and if the allegations in either were sustained by the proof the appellee was entitled to recover. The fact that the jury fixed a less value on the property than that fixed by the appellee does not invalidate the judgment or affect the verdict. That the interest was insurable is certain, and if the agent knew all about it and was so informed at the time the insurance was made, the appellee was entitled to a judgment.

Striking out the 7th paragraph of the answer was proper, and if constituting a defense we are not prepared to determine its effect on the appellant's case in the absence of testimony.

Judgment *affirmed*.

T. B. Fairleigh, William Alexander, for appellant.

Lewis & Fairleigh, for appellee.

RIEKE BROS., ET AL., v. T. J. STRON.**Judgment—Lien—Enforcement—Waiver of Lien.**

Where parties are entitled to a lien on a judgment, but stand by and permit the judgment to be executed upon the land sold and purchase money notes to be bought by an innocent purchaser, they will be held to have waived their lien by failure to enforce it in time.

Usury.

The right to reclaim usurious interest depends upon the election of the party who paid it, and where one dies without any effort to reclaim the interest others cannot do it for him.

APPEAL FROM MARSHALL CIRCUIT COURT.

December 12, 1878.

OPINION BY JUDGE ELLIOTT:

The two partnership firms styled the Morton Brothers and the Rieke Brothers, brought their suit in the Marshall Circuit Court to set aside a deed made by J. L. Brown to A. S. Brown on the ground of fraud, and were successful.

The court set aside the deed and adjudged that Brown's land be sold in satisfaction of the debts of the firms of Morton Brothers and

Rieke Brothers. At the sale of Brown's land the Morton and Rieke brothers became the purchasers, and afterward conveyed the same to T. W. Morton and C. H. Rieke, and the latter sold the land to M. T. Williams for the sum of \$1,200, \$400 of which was paid down, and two notes of equal amounts due at seven and thirteen months executed for the balance. The \$400 paid down was equally divided between T. W. Morton and C. H. Rieke, and each received one of the \$400 notes for the remaining purchase price of the land. Afterward T. W. Morton sold the note on Williams in his possession to appellee, J. T. Stron.

After the sale of this land under Morton and Rieke Brothers' judgment, and after Williams purchased from Morton and Rieke, Gilbert, Johnson and Husbands filed their petitions and asked to be made parties, and claimed that as Morton and Rieke's attorneys they had recovered judgment against Brown, and asked to be permitted to enforce their liens for their fees.

By an amended petition they charged that appellee had loaned T. W. Morton \$5,000, and had charged him usurious interest, and that he, Stron, had bought the note for \$400 executed by Williams to Morton and Rieke in satisfaction of that usurious claim. To this amendment, T. W. Morton having died, a demurrer was sustained on the ground that Gilbert, Johnson and Husbands could not reclaim usurious interest paid out by Morton.

They, then and after the submission of the case, offered to file a second amended petition alleging that Rieke Brothers and Morton Brothers had formed a partnership, by which they agreed to prosecute this joint suit to set aside the deed, which they claimed he had executed in fraud of their rights, and that by their agreement they were to divide equally the profits or pay equally the losses which might result from that litigation, and that therefore each partner had a lien on the proceeds of the judgment for the payment of the cost and attorney fees of the litigation against Brown. This amendment the court refused to permit Gilbert to file.

There can be no doubt but that Gilbert, Johnson and Husbands were entitled to a lien on the original judgment of Morton and Rieke Brothers against Brown, and could have enforced it against the purchase-money bonds. This they failed to do. They stood by and permitted their clients who bought Brown's land to deed it away, and then permitted their vendees to sell it to Williams and take his notes for it, then sell one of his notes to an innocent purchaser, and

then endeavor to enforce their lien on this note in the hands of such purchaser. This is neither just nor equitable. This note in the hands of Stron was no part of the proceeds of Morton and Rieke's judgment against Brown, as the purchasers under their judgment had deeded the purchased land away, and their vendees had sold to Williams, and then one of these vendees transferred one of the Williams' notes to appellee.

If Gilbert, Johnson and Husbands can pursue this land through two private sales, after it was sold in satisfaction of their clients' debts, and enforce their liens on the proceeds of these private sales in the hands of innocent parties, then there is no end to an attorneys' lien once created but to pay it.

Whilst these attorneys could enforce their lien on the proceeds of the sale of the land in satisfaction of Morton and Rieke's judgment, they must lose their lien when the vendees, who purchased at the sale under Morton and Rieke's judgment, have conveyed the land away, and it has again been conveyed to an innocent holder, and especially must they lose their lien against the note of this second purchaser after it has passed into the hands of an innocent purchaser. Nor did the court err in sustaining the demurrer to the amended petition of Gilbert.

The law is well settled that the right to reclaim usurious interest depends upon the election of the party who paid it, and as T. W. Morton died without any effort to reclaim the interest in this case, appellants had no right to do so.

The objection to the filing of the second amended petition was that it was offered after the submission of the case, and was not sworn to; and we cannot say that the lower court abused a sound discretion in refusing to permit it to be filed. Besides, a private partnership to prosecute a law-suit and divide profits and pay losses, unknown to the public, is of questionable propriety, and if it could be enforced at all, certainly cannot when the proceeds of the partnership property has left the firm's hands and fallen into the hands of innocent purchasers.

The brief of appellants is not before us, having been mislaid, but after a careful consideration of all the facts and law of this case we have come to the conclusion that neither Rieke Brothers nor the appellants, Gilbert, Johnson and Husbands, have any enforceable lien on the note sold by T. W. Morton to the appellee, T. J. Stron.

Wherefore the judgment is *affirmed*.

O. AMES, ET AL., v. FELIX MERCER'S ADM'R.

Deed or Mortgage—Homestead Waiver.

A deed or mortgage which purports to convey the whole estate in land, in which the wife unites as a grantor, will, when legally acknowledged by the husband and wife and recorded, be a valid waiver of the homestead exemption in land embraced by such conveyance.

APPEAL FROM MARION CIRCUIT COURT.

December 13, 1878.

OPINION BY JUDGE COFER:

That a deed of mortgage purporting to convey the whole estate in land and in which the wife unites as a grantor will, when legally acknowledged by husband and wife and recorded, be a valid waiver of the homestead exemption in land embraced by such conveyance, must now be regarded as conclusively settled in this state. *Wing v. Hayden*, 10 Bush 276; *Robbins v. Cookendorfer*, 10 Bush 629; *Brame & Wife v. Craig*, 12 Bush 404; *McGrath v. Berry*, 13 Bush 391. The latter case rests upon the ground that Mrs. McGrath did not join in the grant, and therefore it did not purport to convey anything.

An absolute conveyance in words apt to convey the whole estate necessarily evinces an intention to convey all right and interest of the grantors of whatever kind, and is totally inconsistent with the idea that the grantors can assert any interest or privilege in or upon the land in derogation of the rights of the grantee as expressed in the conveyance. The conveyance of the whole carries all the parts. If all is granted nothing remains in the grantors, and it would be an unmeaning and useless formality after conveying the whole to relinquish or waive a mere incident growing out of the title thus conveyed away.

Judgment affirmed.

S. A. Russell, for appellants.

Russell & Arritt, Rountree & Lisle, for appellee.

LUCY JONES, ET AL., v. R. H. WILLIAMS, ET AL.

Homestead—Wife's Interest.

During the life of the husband the wife has no interest in his real estate and the homestead act was not intended to give her any. All she has is the power to prevent a mortgage release or waiver by the husband of the exemption given him. She cannot compel her husband to assert his right to the exemption, nor can she assert it for him or for herself during his life.

Abandonment of Homestead.

Occupancy is necessary to entitle the debtor to a homestead exemption and the act of the husband in removing from the premises and establishing his home elsewhere is an abandonment of the homestead exemption.

APPEAL FROM McCracken Court of Common Pleas.

December 14, 1878.

OPINION BY JUDGE COFER:

Neither the wife nor children of the owner of a homestead have any independent interest in the exemption during his life. The statute gives the exemption to the husband as long as he is alive, and it is only after his death that the wife and children are declared to be entitled to it. During the life of the husband the only effect of the statute is to disable him to waive the exemption without his wife will unite with him in doing so. The wife has a sort of veto power over the right of the husband to waive the exemption. But her power goes no further.

The right to the exemption depends upon occupancy, but the husband still continues to be the head of the family and may abandon his homestead whenever he chooses to do so, or he may make an absolute sale of it at his own uncontrolled discretion. *Brame & Wife v. Craig*, 12 Bush 404. It is only when the husband sees proper to assert his right to the exemption that it is important to inquire whether the wife has united in waiving it. If she has not, then he is entitled to the exemption, not because there is any right in his wife and children, but because the statute declares that he cannot mortgage his homestead, except by writing subscribed by himself and his wife, and acknowledged and recorded. The act of the wife in subscribing and acknowledging the mortgage, release or waiver of the exemption does not pass anything vested in her by the statute, but merely makes efficacious the act of the husband to divest himself of the exemption given to him. If the wife does not unite, the exemption continues, because the condition, and the only condition, upon which the right of the husband to claim it can be divested, has not been performed.

During the life of the husband the wife has no interest in his real estate, and the homestead act was not intended to give her any. All she has is the power to prevent a mortgage release or waiver by the husband of the exemption given him. No power is given to her to

which of the defendants he would proceed and dismiss his complaint as to the other, and as he failed so to do and went on to prove the separate trespass of Benjamin Parsons, the court should have treated this as an election of plaintiff to proceed against Benjamin Parsons, and should have rejected all evidence of a joint trespass by the defendants or of a separate trespass by Wesley Parsons. 2 Starkie on Evidence 806. Under such circumstances the plaintiff could prove as many trespasses as he had counts against Benjamin Parsons, but after proving a separate assault by him he was precluded from proving a joint assault by him and another, but should have been confined to the assaults of Benjamin Parsons, and the action dismissed as to the other defendant.

As there was no conflict in the evidence as to the fact that the assaults in this case were committed separately and at different times by each of the defendants, the court erred in its refusal to grant a new trial.

Wherefore the judgment is *reversed*, and cause remanded for further proceedings consistent herewith.

Bell & Wilson, for appellants. Thompsons, for appellee.

C. AULTMAN & COMPANY *v.* JOHN A. COSTLIN.

Measure of Damages.

The true measure of damages in an action for breach of warranty in a machine is the difference between the value of the machine if it had been of sound material as represented, and its real condition as afterwards ascertained; and although the jury had a right to find the damage the defendant had sustained by reason of his deprivation of the use of the machine, that damage could not exceed the deprivation of the use of the machine when needed to cut defendant's grain.

APPEAL FROM DAVIESS CIRCUIT COURT.

December 18, 1878.

OPINION BY JUDGE ELLIOTT:

No error of the court in giving instructions or refusing instructions was made grounds for a new trial, and a failure to object and except to the instructions of the court amounts to a concession that they are right and proper presentations of the law of the case; but the jury fixed the damages too high even under the instructions.

The true criterion of recovery in a case of this kind is the difference between the value of the machine, if it had been of sound material as represented, and its real condition as afterward ascertained; and although the jury had a right under the instructions to find the damage the defendant had sustained by reason of his deprivation of the use of the machine, that damage could not exceed the deprivation of the use of the machine when needed to cut defendant's grain.

The evidence conduces to show that the machine was broken to pieces about harvest time in 1876, when defendant had twenty acres of small grain to cut, and the cost of cutting the grain in the mode adopted by defendant was not exceeding \$15, and the damage done to the machinery was \$8.50. This amount of damages was all that was proven and all that defendant was entitled to, even under the instructions of the court. Defendant testified that the machine would have been as good as new if one piece of machinery had replaced the one that gave way. If this was so it was his duty to replace this machinery, and if he failed to do it he cannot charge appellants by reason of inability to use the machine. Indeed, such damages cannot be recovered on a suit for breach of a warranty in any way.

In this case the appellants warranted the reaper to be of sound material as they admit. If the materials were not sound appellants must answer to the defendant the sum that he has been damaged, which is the difference between the value of the machine if it had been sound as warranted, and its value in its defective condition when purchased.

Wherefore the judgment is *reversed* and cause remanded for further proceedings consistent with this opinion.

Little & Slack, for appellants. Owen & Ellis, for appellee.

JAMES M. ANDERSON v. STEPHEN V. HAYS, ET AL.

Petition for Breach of Covenant.

To be sufficient a petition for a breach of covenant, the bond sued upon should be set forth in substance so as to show the undertaking of the parties, and to make the bond a part of the petition does not supply these averments.

APPEAL FROM WHITLEY CIRCUIT COURT.

December 19, 1878.

OPINION BY JUDGE HINES:

The allegations of the petition and the amended petitions do not sufficiently set forth a covenant and breach thereof. The bond sued upon should have been set forth in substance so as to show the undertaking on the part of the parties to the bond. This was not done. Making the bond a part of the petition does not cure the defective averments. But even if that were done appellant could not recover. The bond as exhibited was an undertaking to satisfy the judgment of the quarterly court that might be rendered in the cause. No judgment was there rendered, as appears from the petition and amendments; but the cause by agreement between the plaintiff and defendant, and without the knowledge or consent of the sureties in the bond, was transferred to the circuit court; and it is upon the judgment there rendered that recovery is sought to be had. The pleadings fail to show that appellees undertook to satisfy the judgment that might be rendered in any other than the quarterly court. The failure to prosecute the cause to judgment in the quarterly court was a waiver by appellee of his right to go upon the sureties in the bond for the appeal from the justices' court.

Judgment affirmed.

Smith & Richardson, for appellant.

C. W. Lester, R. D. Hill, for appellees.

C. COCONONGHER v. F. M. COCONONGHER, ET AL.

Homestead Exemption—Purchase Money Lien.

One is not entitled to a homestead exemption as against a purchase money lien, nor is a debtor entitled to a homestead as to debts created before he occupies the premises as a homestead.

APPEAL FROM WASHINGTON CIRCUIT COURT.

December 21, 1878.

OPINION BY JUDGE COFER:

The appellant does not complain in this court, nor did he complain in the court below, of the judgment rescinding the contract between him and Bigby; and he must therefore be regarded as consenting that that judgment may stand as rendered. As long as that judgment stands the judgment for the sale of the land does not prejudice him. By the subsequent adjudication of bankruptcy what-

ever interest he had in the land passed to his assignee, and he alone can complain of it if wrong, unless the appellant is entitled to a homestead in the land, and as his object seems to be to test that single question we proceed to decide it alone. The purchase money notes given by Bigby and assigned to the appellees were secured by a lien on the land, and that lien continued after the rescission for the benefit of the assignees.

Whether they could enforce it against the homestead exemption we need not decide, because on his own showing he is not entitled to a homestead as to debts created before he occupied the premises as a homestead. At the time he assigned Bigby's notes to the appellees, he did not reside on the land in controversy, but on another tract in which he was entitled to a homestead; and having surrendered that he could not, by his subsequent occupation of the land sold to Bigby, acquire a right to an exemption in that land to the prejudice of creditors whose debts were created before such occupation commenced. And moreover he entered while the land was in the hands of a receiver, and could not thereby acquire any right to a homestead as against the plaintiffs in that suit.

That the bankruptcy court set aside a part of the land as a homestead cannot affect the decision of this case. The state court had possession of the land, and the appellant, by entering upon the court's possession, became either a trespasser or a tenant of the court, and could not claim any benefit on account of his possession. He must be treated now precisely as if he had not taken possession after the judgment of rescission, and the land being thus in the possession of the state court the bankruptcy court had no jurisdiction to oust the jurisdiction of the state court already acquired. *Linthicum v. Fenley*, 11 Bush 131.

We are therefore of the opinion that the appellant was not entitled to a homestead exemption in the land, and as he appears now to have no other interest in the matter, the numerous errors in the record are not to his prejudice, and the judgments appealed from are therefore *affirmed*.

Belden & Shuck, for appellant.

A. Duvall, R. J. Browne, for appellees.

GEORGE WASHINGTON v. COMMONWEALTH.

Criminal Law—Grand Larceny—Receiving Stolen Goods—Evidence.

When the accused is on trial for stealing doeskin cassimere, or for receiving it knowing it to have been stolen, in order to make out the latter offense the state had a right to prove that the accused about that time had received other stolen goods.

Evidence in Larceny Case.

In an indictment for larceny evidence that the prisoner had committed another distinct felony than that for which he is on trial is inadmissible.

APPEAL FROM BOURBON CIRCUIT COURT.

December 21, 1878.

OPINION BY JUDGE ELLIOTT:

Appellant and John Henderson were indicted for the crime of having stolen a piece of doeskin cassimere, and a piece of diagonal or piquet of the value of over ten dollars. They were also indicted for having received these goods, knowing them to be stolen goods. The evidence conduced to prove that the diagonal or piquet piece of goods had been stolen several months before that of the doeskin cassimere. The charge was that the goods had been stolen from the mercantile establishment of S. E. Tipton & Company, Paris, Kentucky.

On appellant's motion the appellee was ruled to elect for which offense it would prosecute appellant, and it elected to prosecute for the offense for stealing and receiving the doeskin cassimere, knowing it to have been stolen.

After the introduction of evidence tending to prove that John Henderson had stolen the goods, and that appellant was along with him both when the goods were stolen and when they were found in Henderson's possession, the appellee, over appellant's objection and exceptions, was permitted to prove that the diagonal cloth (the indictment for stealing which had been dismissed as to appellant) had been found in the possession of Peter Mason, and Peter testified that some time before the arrest of appellant he had purchased the goods of him.

The appellant was on trial for stealing the doeskin cassimere, or for receiving it, knowing it to have been stolen, and in order to make out the latter offense the state had a right to prove that the

prisoner about that time had received other stolen goods. But in this case when the commonwealth closed its evidence it had made out the crime of larceny or nothing, and did not insist on any instructions as to the count for receiving stolen goods.

The appellant then moved the court to exclude from the jury all the evidence tending to show either that he had stolen the diagonal cloth or received it, knowing that it had been stolen, and to the overruling of this motion the appellant excepted.

There are several classes of crimes where other offenses of like nature may be proved against the prisoner to show the intention with which he committed the offense charged, as where one is accused of passing counterfeit money, forging written instruments or receiving stolen goods. Other offenses of a similar nature are admitted for the purpose of showing the guilty motives of the prisoner in the commission of the offense charged.

But on an indictment for larceny evidence that the prisoner had committed another and distinct felony than that for which he is on trial is clearly inadmissible. Indeed, that is the general rule as to indictable offenses.

"Testimony of the prisoner's guilt, or participation in the commission of a crime, wholly unconnected with that for which he is put on his trial, cannot, as a general rule, be admitted." Roscoe's Criminal Evidence, 92 (note); *Dunn v. State*, 2 Ark. 229; *Commonwealth v. Call*, 21 Pick. (Mass.) 515.

Therefore, as the appellant was on trial on the charge of having stolen a piece of doeskin cassimere, all evidence tending to prove him guilty of the distinct crime of having stolen the diagonal cloth was inadmissible, and should have been excluded by the court from the jury.

Wherefore the judgment is *reversed* and cause remanded for further proceedings consistent with this opinion.

Charles Offcutt, for appellant. Moss, for appellee.

E. B. TRABUE, ET AL. v. CITY OF OWENSBORO.

Damages from Pest-House.

The erection of pest-house for patients having contagious diseases is within the powers of a municipality, and a city cannot be liable for erecting and using such a house unless it does so in a manner unnecessarily calculated to endanger the spread of disease, or has erected it in an unsuited place or unreasonably near to habitations.

Pest-House, Where Located.

A pest-house may legally be located at any place not so near to habitations as to give reasonable ground for apprehending that disease may be communicated to those residing in the neighborhood, and before an action may be maintained to enjoin the city from its operation there must be actual and not merely fanciful injury.

APPEAL FROM DAVIESS CIRCUIT COURT.

January 7, 1879.

OPINION BY JUDGE COFER:

The appellants brought this suit against the city of Owensboro to recover damages for the alleged wrongful and unlawful erection of a pesthouse within 115 or 120 feet of their residence, and its use as a hospital for persons afflicted with infectious and contagious diseases. They did not allege that disease had been communicated to themselves or any member of their family or inmate of their house from the pesthouse or patients therein, or that there had been any negligence in its management, or any other wrong except the building and use of the house, or that they had sustained any damage in consequence except that it would be dangerous to live near to the house, and that in consequence and through fear of contracting some infectious or loathsome disease, and in order not to be in continual alarm, they were compelled to abandon their house and were unable to sell or rent it for anything like its real value.

The erection of a pesthouse or hospital for patients suffering with infectious or contagious diseases is a proper exercise of the ordinary powers of a municipal corporation, and especially of one that, according to the common custom of the country, may on account of its population be denominated a city.

The city of Owensboro cannot, therefore, be liable to an action for erecting and using such a hospital unless it has done so in a manner unnecessarily calculated to endanger the spread of disease from, or has erected it in an unsuited or improper place, or unreasonably near to habitations.

That it is so near to the appellants' residence that it is dangerous for them to live in it is not sufficient. It should appear that the danger is imminent, and that it may reasonably be apprehended that disease will be communicated from the hospital to persons occupying the residence. The mere possibility of such a result is not suffi-

cient to subject the city to an action. Nor can the court say that the danger is imminent at the distance of 120 feet.

Unless the danger is such as reasonably to excite apprehension of danger of infection in the houses or on the premises of adjacent proprietors, the incidental injury resulting from apprehension of danger or aversion to the proximity of the hospital must be borne as one of the incidents of civilization. Such hospitals are necessary in a town or city of considerable population. They must be built somewhere within convenient reach of the body of population, and some must be nearer than others to their location. There must be a limit somewhere as to the distance from residences within which they may be built. To require that distance to be so great that there would be no danger, i. e., no possibility that disease could be communicated from the hospital, would be unreasonable and probably impracticable. The only rule, therefore, which can reasonably be adopted, is to say that they may be lawfully located at any place not so near to habitations as to give reasonable ground for apprehending that disease may be communicated to a neighboring residence.

The rule applied in cases of railroads and other public works that mere annoyance from noise or smoke, or danger from fire, must be borne by the owners of adjacent property, applies to a case like this so far as a mere vague or unreasonable apprehension of danger, or aversion to the neighborhood of a hospital, are concerned. But when it is so near as to create a well-founded apprehension, then there is an actual and not merely imaginary or fanciful injury, and reason and natural justice demand that the owner of property thus injured should be compensated.

But the allegations of the petition did not bring the case within the rule indicated, and the demurrer was properly sustained. The hospital does not appear to be near to any other dwelling, and no general objection to its location seems to exist, and it does not therefore appear that the doctrine applicable to public nuisances has any application to this case.

But even though it was a public nuisance it does not necessarily follow that the appellants might not have recovered if they had shown themselves within the principles we have announced. One who suffers a peculiar injury not common to all affected by such a nuisance may recover for such injury.

Judgment *affirmed*.

John H. McHenry, for appellants. W. N. Sweeney, for appellee.

HARVEY SMITH *v.* LOUISVILLE CITY RAILWAY.**Negligence of Common Carrier.**

The fact that a passenger has stepped from the train onto the railroad platform, does not terminate the railroad company's liability, for it is its duty to have prevented any injury to the passenger by the cars, and if those operating the car saw such passenger's peril and failed to exercise proper care to protect him the company would be liable.

Injury to Passenger.

Where a passenger has left the car and while he is on the platform, and the conductor, while standing on the lower steps, his body protruding, started the train and his body struck the passenger on the platform, injuring him, it will amount to negligence, for it is the company's duty to give such passenger a reasonable time to place himself beyond danger before putting the car in motion.

APPEAL FROM JEFFERSON CIRCUIT COURT.

January 7, 1879.

OPINION BY JUDGE PRYOR:

The undertaking of the appellee, as alleged by the appellant, is only such a contract as the law creates between the carrier and the passenger, and the former may be relieved from liability by the act of the passenger, or by exercising such a degree of diligence as conduces to show that the injury was not the result of the company's negligence or that of its employees. The cause of action in this case is the negligence of the employees, the contract to transport the plaintiff imposing on the company the duty of exercising proper care and caution in carrying him to his place of business.

The negligence complained of is that the conductor, in starting the cars after the plaintiff had left them, by retaining his position on the steps, his body protruding, was thrown against the plaintiff by the impetus of the cars and the latter knocked down and injured. That the appellant got off of the car at the proper place is not contradicted, and the jury was told that although the plaintiff had left the train, still it was appellee's duty to give him a reasonable time to place himself beyond danger before putting the car in motion; and the evidence showing that appellant was very weak and infirm, the jury were further told that in determining what was reasonable time they should take into consideration appellant's physical condition.

The fact that the appellant had reached the ground and was leav-

ing the cars did not terminate appellee's responsibility; it was still the duty of appellee to have prevented any injury to plaintiff by the cars, and if he saw plaintiff's peril and failed to exercise proper care to protect him, the company was liable. This was the substance of an instruction also given the jury, and we think the appellant has no cause to complain of the law by which his right of recovery was tested. It is true that in the special interrogatories propounded, the jury was not asked to say whether the appellant was knocked down by the body of the conductor as the car moved off, still, the jury was required to say whether the injury resulted from the negligence of the employes, and the response was in the negative. The answer of the jury to the questions propounded all conduce to disprove the existence of the facts alleged by the appellant, and we perceive no room for reversing the judgment.

Judgment *affirmed*.

W. R. Abbott, Edwards & Seymour, for appellant.

M. Mundy, for appellee.

JOHN D. GORDON, ET AL., v. MAMES, MUIR, ET AL.

Sufficiency of Petition.

Where a writing sued on is copied in full in the petition and imports a promise to pay the sum sued for, no allegation of any other promise is necessary.

APPEAL FROM CLARK COURT OF COMMON PLEAS.

January 8, 1879.

OPINION BY JUDGE COFER:

If it be conceded that the assignment of errors is sufficient to raise the question of the sufficiency of the petition the judgment must still be affirmed. The writing sued on is copied in full into the petition, and imports a promise to pay the sum sued for, and no allegation of any other promise was necessary. The cases cited by counsel were unlike this. There the pleader did not set out in his petition the writing sued upon, but alleged that it was a writing of a certain character, without stating more except to refer to and make it part of the petition. Whether the writing was what he styled it was merely his conclusion; and when he alleged that it was a note he did not allege a fact, but merely his opinion. In this case the writing

sued upon is copied into the petition, and the court may decide whether it has been correctly called a note. The writing is not in fact a note. It is a simple acknowledgment of indebtedness; and from that acknowledgment the law implies a promise, and the code dispenses, in such cases, with the averment of the promise.

No allegation the plaintiff could have made would have made the petition better than it is. All the facts necessary to the cause of action appear from the writing, and no allegation that could have been made would have affected in any way its legal import. John D. Gordon acknowledged that he owed the plaintiff \$75, and the law thereupon raised a promise to pay it; and an allegation of a promise would have been a mere allegation of a legal presumption, which, as we have said, is not necessary.

Judgment affirmed.

W. M. Beckner, for appellants. J. & J. W. Rodman, for appellees.

ELIZABETH STETSON *v.* ANCIENT ORDER OF UNITED WORKMEN.

Forfeiture of Death Benefits.

Where a member of the Ancient Order of United Workmen is suspended in accordance with the usages and customs of the order for failure to pay his dues, and after notice fails to contribute to discharge the benefits resulting to others, neither he nor those claiming under him have any right to complain.

APPEAL FROM JEFFERSON COURT OF COMMON PLEAS.

January 10, 1879.

OPINION BY JUDGE PRYOR:

If a member of the order is to be suspended or expelled for the nonpayment of assessments made upon him by the vote of a majority of the members, such a conclusion is alone to be arrived at by implication. There is no section or provision of the charter or by-laws of the organization prescribing the action to be taken by the lodge in such a case. It is evident that the lodge must act upon the question in some way, and that the suspension must be made during the session of the lodge; whether by the mere announcement of the presiding officer, or by the vote of the lodge, in the absence of any fixed rule on the subject, it seems to us is immaterial.

By Sec. 2 of Art. 11 of the organic law of the body, a member in

default by reason of the nonpayment of his assessment is not a member in good standing, and when this default exists, the member having notice of his delinquency and being presumed to know the nature of the law by which he is governed, it may be of itself sufficient to forfeit all right to the benefits of the order. Whether so or not, the fact that the deceased was in default and was so notified time and again by those in authority is not controverted, and in open lodge, with the members present, this default on his part was announced by the presiding officer, and his suspension as a member ordered and entered on the minutes of the proceedings without objection. This was equivalent to a unanimous vote on the subject, and in the absence of any definite mode of proceeding in such a case, regulated by the law of the order, it appears was in accordance with the usages and customs of the order with reference to this question. Failing to contribute after notice to discharge the benefits resulting to others he nor those claiming under him have any right to complain, and this court will not adopt a regulation for the order that is shown to be contrary to its mode of proceeding, by implying that a vote should have been actually taken, because a vote is required where a member is suspended or expelled for other reasons than for the nonpayment of dues.

The judgment below is *affirmed*.

William Mix, for appellant.

Kinney, Bernard & Canup, for appellees.

WILLIAM S. KEETES v. COMMONWEALTH.

Quashing Bail Bond.

Where one accused of crime in an examining court is committed to jail in default of bail, the amount being fixed at \$1,200, and no record appears showing its reduction or that he was discharged by reason of the execution of the bond, and nothing appears in the record to show any authority for taking a bond from him in the sum of \$800, but it is sought to hold a surety on such a bond, the bond should be quashed.

APPEAL FROM HARDIN CIRCUIT COURT.

January 14, 1879.

OPINION BY JUDGE PRYOR:

There is nothing in this record showing any authority for the taking of the bond for \$800. The accused had been tried before an

examining court and committed to jail in default of bail, the amount being fixed at \$1,200. How he was released from custody does not appear. There is no minutes or proceedings showing that his bail was reduced, or that he was discharged by reason of the execution of the bond for the amount for which the appellant has been made liable. The response should have been held sufficient and the bond quashed.

Judgment *reversed* and cause remanded for further proceedings etc.

Judge Cofer not sitting.

Montgomery & Preston, for appellant. Moss, for appellee.

MEHLER & ESTENKEMPER v. JOHN FERGUSON, JR.

Innocent Purchaser of Note.

Where there is an agreement between a debtor and creditor that a note given to evidence the debt shall be paid in lumber, but no mention of this is made in the note, which is a plain note payable in bank, and the note is purchased before maturity for a valuable consideration without notice or knowledge of the agreement as to how it is payable, the innocent holder is protected and may collect it according to its terms.

Notice of Defense.

A notice to an assistant cashier of a bank of a defense to a note given before the bank discounts the note is not notice to the bank, where it is shown that neither the president nor cashier had any such notice, and where it is shown that the assistant cashier had no voice in discounting paper, and had not been intrusted with or permitted to discharge any such duty by the bank.

APPEAL FROM JEFFERSON COURT OF COMMON PLEAS.

January 15, 1879.

OPINION BY JUDGE PRYOR:

That the appellants were to deliver lumber to Metcalfe sufficient to pay for the property purchased is made manifest from the parol proof in the case, as well as the agreement between the parties. At the time the notes were executed they had an account for lumber against him for near \$2,000, and if there was no other agreement in regard to the notes or the use of them by Metcalfe than that they were to be discharged in lumber, it is a little remarkable that the

notes upon their face were payable in money, and made negotiable at one of the banks of the city. As ordinarily prudent business men, appellants would have protected themselves by inserting the manner of payment in the body of the note, and this would have been done but for their agreement that Metcalfe might use the notes for his own purposes; and having been paid for his property in lumber, the latter assumed the responsibility of taking the notes up at maturity. The appellants never contemplated paying the notes, but said in effect to Metcalfe by the terms of the agreement he had given them, you can use the notes as you think proper if you will take them up at maturity, and we will pay you in lumber for your property.

Metcalfe's credit was then unquestioned, and the appellants entertained no fears as to their responsibility on the notes. The agreement, after describing the property purchased and the notes given for the purchase money, recites: "I do hereby agree to take out said notes in lumber, and to take up said notes when due and to deliver them to Mehler and Estenkemper." If Metcalfe was not permitted to use the notes for the purpose of raising money, the appellants furnishing lumber to pay for the property instead of taking up the notes, why the necessity of such an agreement between them? The appellants are business men, and must at least be required to understand the effect and meaning of a contract evidencing an ordinary business transaction; and the fact that Metcalfe agreed to take up the notes evidences the existence of an agreement amounting to nothing more or less than that the credit of the appellants might be used in conjunction with Metcalfe to enable the latter to raise money; and in such a state of case, whether the note is negotiable or not, a bona fide holder for value is entitled to his judgment. Metcalfe's testimony is fully sustained by the agreement already referred to, and the proof is ample that Metcalfe was to use the notes, take them up at maturity, and then settle with the appellants for lumber purchased, in satisfaction of what might be owing on the property. The case of *Gano v. Finnell*, 13 B. Mon. 390, sustains this view of the question; and in fact it is not necessary to cite authority for the purpose of showing that, where a party permits his credit to be used in such a manner, he cannot make innocent parties suffer by reason of any default on the part of those in whom he has trusted.

It is certain that Ferguson had no notice of this agreement between these parties, and whether the note was discounted or not is

immaterial in determining the question involved. If, however, the facts, as insisted by counsel, do not authorize the conclusion reached, it is clear that the assignee of Metcalfe had the right to have the note discounted, and that it was discounted in good faith is clearly proven. Whether the maker of the note could by actual notice have prevented the discount does not arise, as the case is now presented. Conceding that the Marion County National Bank is but a representative of the commercial bank, or the same bank under a different name, still no notice was given that bank of the existence of a set-off intended to be asserted by appellants against the note in controversy. The parties to the note had placed it in the power of the assignee to discount the paper and made it negotiable and payable in bank for that purpose, and when he does negotiate or discount it, with the bank at Lebanon, is told that the discount is ineffectual because a circular was received by the assistant cashier of the bank giving notice of the defense intended to be made by the makers.

We know of no rule of law requiring the president and directors of a bank, or such officers as are intrusted with the duty of discounting paper, to make inquiry of those in subordinate positions to know if they have a knowledge of any infirmity in the paper offered. Neither the president nor cashier seems to have known of appellants' defense, and to make notice to an assistant cashier, or any other officer of a bank whose duty in a bank is foreign to that of discounting paper, notice to the bank, in a case like this, would be developing a new feature in the history of commercial law. The proof is that this assistant cashier had no voice in discounting paper, nor had he been entrusted with or permitted to discharge any such duty by the bank. The rule as laid down in *Morse on Banks and Banking* is: "If an officer is acting, speaking, or receiving information in matters which the ordinary usage of the banking business casts within the range of his functions, the bank is bound and affected thereby, as any other principal, by the act, declaration, or knowledge of the agent. * * * Each agent can only act in his own agency. In like manner, demand or notice can affect the bank only if it be made upon or given to the officer having charge of the subject-matter which the notice concerns. If it be given to one within whose sphere the business in question does not fall, the bank is not chargeable with it; neither answerable for negligence if it fails to act upon it." *Morse on Banks and Banking* (2d ed.) p. 89.

Any other rule than the one defined would require the principal

bank officers to consult with those in subordinate positions in all matters pertaining to the business of the bank, and particularly in regard to the character of paper that is constantly before the bank for discount.

The chief officers of the bank are doubtless required to consult those in minor positions with reference to matters coming within their sphere of action, and it would be unreasonable to place any other or greater obligation upon them in this regard. It therefore results that the paper was properly discounted, and for this reason, if for no other, the appellants must fail in their defense.

Judgment affirmed.

Barrett & Brown, L. M. Dembitz, for appellants.

Barr, Goodloe & Humphrey, for appellee.

JAMES McILVAINE v. MARTHA H. McILVAINE.

Dower.

Where the husband has been seized beneficially by an equitable title to real estate, and so continues up to his death, his widow is entitled to dower; but where the husband has no beneficial interest in land, but if it is acquired for the benefit of and conveyed immediately to others, the wife is not entitled to dower therein.

APPEAL FROM WARREN CIRCUIT COURT.

January 15, 1879.

OPINION BY JUDGE ELLIOTT:

About 1846 a man by the name of Porter died in Warren county possessed of a large real estate; 148 acres of his land was set apart to his widow as dower.

He left seven children and heirs at law. During the lifetime of Porter's widow, Alexander McIlvaine purchased the interests of five of his heirs and John Porter, his son, bought the interest of one of his heirs, so that at the widow's death Alexander McIlvaine owned five and John Porter two shares in this land.

One Gladdish had bought four shares of this land, and these shares were purchased by Alexander McIlvaine; as also the interest of Mrs. Neal, who was Porter's heir at law. The heirs at law and Gladdish all joined in a deed on the 9th day of January, 1847, conveying this tract of land to Alexander McIlvaine, with the distinct understanding, as they say, that he was to convey the two interests owned by John Porter to him, and accordingly at the same time

Alexander McIlvaine executed his title bond to John Porter, by which he agreed to convey to him fifty acres of the land giving the boundary by deed of special warranty.

In 1864 Alexander McIlvaine died, and in 1877 the appellee, who is the widow of Alexander McIlvaine, brought this suit, claiming a dower interest in this land against appellant, who had purchased the same of John Porter.

The material facts alleged in appellant's answer have been established by the evidence, and the only question is whether in such a case the widow is entitled to dower. By the common law the widow was only entitled to be endowed of the lands of which her husband had been legally seized during the coverture. But this court has decided that under our statutes, if the husband has been seized beneficially by an equitable title and so continues up to his death, that his widow is entitled to dower in such landed estate. But if the husband has never been beneficially seized his widow is not entitled to dower.

We think the case of *Gully v. Ray*, 18 B. Mon. 107, is conclusive of this case. In that one Gully settled on the land in 1806, and afterward purchased it of Anderson and Vancleave. The time of his purchase did not appear, but as Anderson and Vancleave did not acquire title until 1818, the rational inference would be indulged that Gully's purchase was after that time.

In 1824 Gully sold to and put one Jones in possession of the land, he only having an equitable title at the time. Afterward, in the year 1836, Jones having died and his heirs wishing to obtain legal title to the land, procured through agent the execution of a deed of conveyance by Anderson and Vancleave to Gully, and one from him to themselves. The court says: "Both deeds were executed on the same day, and the title was conveyed to Gully, in order that he might convey it to the heirs of his vendee with a covenant of warranty."

The suit in that case was by Gully's widow against the vendee of Jones' heirs, and the court, after reference to authorities, says: "Now here the husband had parted with his equitable title to the land, and with the possession of it, before he obtained the legal title. He held the legal title in trust; it conferred upon him no beneficial interest in the land, but was acquired for the benefit of and conveyed immediately by his deed to the heirs of his vendee. It was not such a beneficial seizin therefore as entitles the wife to dower." It is further ruled that "The same doctrine applies when

the husband takes a conveyance in fee, and at the same time mortgages the land back to the grantor, or to a third person, to secure the payment of the purchase money. Dower cannot be claimed as against rights under that mortgage. The husband is not deemed sufficiently seized by such an instantaneous passage of the title in and out of him, to entitle his wife to dower as against the mortgagee.

The purchaser is not estopped by the husband's deed from explaining the nature of his seizin and showing that it was not of such a character as entitled his wife to dower in the land." For, says the court, "A widow is not dowable of land of which her husband was not beneficially seized during the coverture."

In the case under consideration the evidence preponderates to the conclusion that appellee's husband never owned the land of which she seeks to be endowed. He had bought five-sevenths of the tract which embraced it, and the deed by Porter's heirs was made to him on the express condition that he would convey the two-sevenths thereof owned by John Porter to him, and the fact that he executed the title bond to John Porter on the same day that the deed was made to him, and that he only agreed to convey such interest with covenants of special warranty, and the additional fact that the appellant, his son, purchased the land of Porter at his solicitation, strongly corroborates the other established facts.

There is no evidence that appellee's husband ever was possessed of the land of which she claims dower; but it is, on the contrary, established by the evidence that John Porter remained in possession thereof after the death of his mother until he sold it to appellant, who has been in possession ever since.

We are therefore of opinion that appellee's husband had no such beneficial seizin of the land in dispute as will entitle his widow to dower therein.

Wherefore the judgment is *reversed* and cause remanded with directions to the court below to dismiss the appellee's petition.

Wright & McElroy, for appellant.

Wilkins & Wilkins, for appellee.

GEORGE S. HUME v. J. H. MADDOX, ET AL.

Certificate to Mortgage.

A certificate to a mortgage is not invalid when it is made as if by the clerk in person but signed "J. T. Bynum, D. C., for John A. Wilson, C. F. C."

APPEAL FROM FULTON CIRCUIT COURT.

January 15, 1879.

OPINION BY JUDGE HINES:

Appellant complains that the court below erred in its judgment directing the commissioner to set aside a homestead to the appellees. As there is no brief for appellees and nothing in the judgment to aid us, we must resort to the record and to the brief of counsel for appellant to ascertain the grounds upon which the court below based its action.

It is suggested that the certificate to the mortgage of Maddox and wife is insufficient, and that the court below so held, because it is not signed by the clerk. The certificate is made in the usual form, as if by the clerk in person, but signed: "J. T. Bynum, D. C. for John A. Wilson, C. F. C." Does this affect the validity of the certificate so it is not as much the act of the clerk as if it had been signed "John A. Wilson, C. F. C. by J. T. Bynum, D. C.,"? In either case it purports to be the certificate of the clerk, written and signed for him by his deputy. Whatever the clerk can do the deputy may do for him and in his name. It is manifest that the intention was to make the certificate the act of the clerk by his deputy, and it would be trifling with the well established canons of construction to hold that the manner of signing should control the otherwise clear intention, a killing of the spirit with the letter and the dry technicalities of the law.

Wherefore, so much of the judgment as grants the appellees a homestead in the mortgaged property is *reversed*, and cause remanded with directions for further proceedings consistent with this opinion.

A. Duvall, H. A. Tyler, for appellant.

JAMES R. CALLOWAY v. JOHN B. TODD.**Attachment for Contempt.**

A witness duly subpoenaed may be attached and punished for contempt of court for failing to obey the subpoena, but cannot be so attached and punished where he fails to keep his promise to one of the parties to attend, when he has not been subpoenaed.

Waiver of Mileage Fees.

Where a witness is subpoenaed, he may waive the payment of mileage and expenses, when he otherwise would be entitled to them, and where he does so and fails to obey the subpoena he may be attached and punished for contempt, notwithstanding no fees have been tendered to him.

APPEAL FROM JEFFERSON COURT OF COMMON PLEAS.

January 16, 1879.

OPINION BY JUDGE COFER :

Attachments are awarded against witnesses on the ground that they are in contempt of the authority of the court in failing to appear when legally summoned. But a witness is not in contempt of the court simply because he has not kept his promise to one of the parties to be present and testify.

No doubt a witness legally summoned may waive the payment of mileage and expenses, and by doing so may subject himself to attachment for failing to appear in obedience to the subpoena. In that case it would be his duty to attend unless excused by the default of the party who caused him to be summoned, but he could not, after waiving the payment of his mileage, etc., set up the failure to pay as an excuse for his disobedience.

Nor is this at all technical. It is the plain legal duty of a litigant to take the appropriate legal steps to produce his evidence in court, and he has no right to rely upon means not provided by law and to depend upon the promise of his witnesses and neglect the legal method; and then, when his witness has disappointed him, to throw the consequences of his own default upon his adversary by subjecting him to the expense, inconvenience and delay rendered necessary by his own reliance upon his witness, in preference to relying upon the law to secure the attendance of the witness.

Petition overruled.

D. M. Rodman, for appellant.

W. P. Thorne, Russell & Helm, for appellee.

J. M. PROVINCE, ET AL., v. J. W. LEONARD, ET AL.

Pleading Amendments.

After the evidence is in it is not such an abuse of the court's discretion to refuse to permit the plaintiff to so amend his petition as to substantially change the claim set up in the original petition as will require this court to reverse the cause on appeal.

APPEAL FROM McCRACKEN CIRCUIT COURT.

January 16, 1879.

OPINION BY JUDGE HINES:

The original petition in this case alleged, in substance, that J. M. Province, J. C. Province, J. V. Fly and J. N. Warwick sold to J. W. Leonard a certain number of stave trees for a specified sum, and prayed attachment and judgment for their value. Subsequently an amended petition was filed, setting forth that Leonard was the agent of Romaine & Roth, and asking attachment and judgment against them. To the petition and the amended petition Leonard answered as agent for Romaine & Roth, denying the purchase jointly from the Provinces, Fly and Warwick, and denying also the other material allegations of the petitions.

After the evidence was in, showing that the only contract that was made was between J. M. and J. C. Province, they offered an amended petition setting forth these facts, omitting the names of Fly and Warwick, and asking permission to prosecute the case in the name of the Provinces. The court refused to allow the amendment to be filed and dismissed the petition. From that judgment this appeal is prosecuted.

The questions arising on the appeal are, first, did the court have power under section 134 of the Civil Code to allow the amendment, and, secondly, if the court could permit the amendment, was it guilty of an abuse of discretion in refusing it.

We are clearly of the opinion that the court did not err in refusing the amendment, and that whether it be placed upon the ground to allow the amendment or upon the ground of the abuse of discretion. The amendment was not such a one as is provided for by Sec. 134, Civil Code. It substantially changes the claim set up in the original petition, and therefore cannot be placed upon the ground of conforming the pleading to the proof. The original petition alleged a sale jointly by the four plaintiffs mentioned, while the amendment set up a contract made with the Provinces only. It does not present a case of variance in the proof, which may be corrected by amendment, but a case of failure of proof. If, however, it be a variance and not a failure of proof which the court might have permitted to be corrected by amendment, we cannot say that the court below was guilty of such an abuse of discretion, in refusing permission to file the amendment, as would justify a reversal. The plaintiff had notice from the answer, before the taking of proof, that

the defendants would raise the question of the right of the four plaintiffs to prosecute the action jointly. This renders it unnecessary to answer the other objections raised.

Judgment *affirmed*.

Bigger & Reid, for appellants. L. D. Husbands, for appellees.

H. C. MEYERS v. EZRA POINTER, ET AL.

Dower.

Where a widow has accepted the provisions of the husband's will she is not entitled to dower.

Bond for Deed.

Where the holder of a title bond has paid for the land he is entitled to, and where the ancestor executed such bond in a proper proceeding, the court should order the heirs to execute a deed, and it is error for the court to order the land sold to pay plaintiff's lien. Plaintiff in such a case is entitled to the conveyance of the land.

APPEAL FROM NICHOLAS CIRCUIT COURT.

January 17, 1879.

OPINION BY JUDGE ELLIOTT:

On the 22nd day of October, 1866, the appellant executed his note to appellee, Evaline Pointer, by which he promised on or before the 1st of March, 1868, to pay her \$300, but the note was not to be collected until the appellee and her husband, Ezra Pointer, should cause to be made to appellant a good and sufficient deed to a tract of sixty-two acres of land lying in Nicholas county, and for the title to which appellee, Evaline Pointer, held the title bond of Thomas A. Marshall.

On the 1st day of January, 1872, the appellee brought this suit to recover judgment on the note, and for an enforcement of their lien on the land for its payment.

Their petition was defective because they failed to state that they were able to make a good and sufficient title to the land sold to appellant; and had the appellant stood on his demurrer they had no case in court. But appellant, after his demurrer was overruled, filed his answer and alleged that the plaintiff's title was neither good nor sufficient, for the title was in the heirs of Thomas A. Marshall.

The plaintiffs then amended their petition and admitted that the title was in the heirs of Thomas A. Marshall, and made them and Marshall's widow defendants, alleging that the purchase money had been paid, and asked that they be compelled to convey their title to plaintiffs, as they held Thomas A. Marshall's bond for title. This

was an allegation that appellant had a good and equitable title which they were seeking to perfect, and made an issue on the title.

Thomas A. Marshall's widow answered and claimed dower in the land, and one of his daughters answered and claimed interest in it.

Having accepted the provision of the husband's will, Mrs. Marshall was not entitled to dower, and the purchase money, according to the evidence, having been paid, the court should have ordered them to convey the land according to the stipulations of their ancestor's bond, which it was proved he executed. This the court failed to do, but instead adjudged a sale of the land in satisfaction of the plaintiff's lien, and the judgment allowed interest on the plaintiff's claim from the beginning of this suit and the tender of the deed, and of this appellant complains.

It seems to us that the note sued on was due in no event till the first of March, 1868, and not then until the plaintiff made to defendant a good and sufficient deed. The language of the note imports that such was the contract, and the evidence is almost conclusive that such was the understanding of the parties.

Besides, the deed which appellants say they tendered was not made a part of their petition nor offered in evidence, and not being a part of the record this court cannot say that it conforms to the agreement between the parties. By the judgment the defendant is made to accept the deed tendered, when it is admitted by the plaintiffs that the title is in Marshall's heirs, and the deed tendered is the deed of the plaintiffs, whose title is only equitable.

Under the contract sued on the defendant, Myers, was entitled to a good and sufficient deed before he parted with his money and a good and sufficient deed means a deed conveying a good legal title. The costs were properly adjudged against the plaintiffs. The bond given by the plaintiffs to the nonresident defendants, who were some of Marshall's heirs, makes them incur no responsibility unless the nonresidents should appear and open the judgment within five years from March, 1876, when the judgment was not rendered till July, 1877. This was not such a bond as the Code requires. No errors are perceived prejudicial to appellees on their cross-appeal, and the judgment on the cross-appeal is *affirmed*. But for the errors indicated by appellant, Myers, the judgment is *reversed* and the cause remanded for further proper proceedings.

Ross & Kennedy, for appellant.

Hargiss & Norvall, for appellees.

TRUSTEES OF NATIONAL BANK OF FRANKLIN v. FORD & BROS.

Assignor's Liability.

The unreasonable delay of the holder of a note in prosecuting his action to collect a note, after instituting a suit, will release the assignor; but where it is made to appear that the continuances of the cause were at the request of said assignor he is not released because of such delay.

APPEAL FROM SIMPSON CIRCUIT COURT.

January 18, 1879.

OPINION BY JUDGE HINES:

B. W. Vingard, being indebted to Ford & Bros., executed to them a note, which was secured by a lien upon a certain piece of property against which there were several other liens.

Ford & Bros. assigned the note, before due, to the First National Bank, Franklin, Kentucky, and the bank brought suit upon it, at the first term of the court after it fell due, making appellees and other parties interested in the property defendants. At the first term to which the suit was brought, August, 1872, it was continued by order of the plaintiff, but whether with the consent of the Fords the evidence is conflicting. At the next term of the court, February, 1873, a written agreement was entered into by the Fords, in which they requested a continuance of the case and expressly agreed to remain bound on their assignment to the bank. At the next August term, 1873, no order was made, and the cause went over to the February term, 1874. At that term additional pleadings were filed and the case went over to the August term, 1874, without any order of continuance. At the August term, 1874, the case was submitted, but the judgment, being unsatisfactory to the parties, was by agreement set aside. To secure the vacating of this judgment the Fords requested the bank, in writing, not to proceed further in its attempt to collect the claims against Vingard until it should be determined whether the decree could be set aside, and expressly agreed to remain bound as assignors to the bank. At the next February term, 1875, exceptions to commissioner's report of sale were sustained, judgment set aside and amended pleadings filed. The pleadings appear not to have been completed and the case ready for submission until February, 1876, when a decree was entered and the land sold; and failing to realize anything out of the proceeds, and after execution returned "no property found," the bank brought suit in July, 1876, to recover of the Fords on their assignment; and judg-

ment having been rendered dismissing its petition this appeal was taken.

Appellees insist that the judgment should be affirmed for these reasons: 1. Want of diligence in prosecuting the suit to enforce the lien on the property of Vingard; 2. Want of consideration for the execution of the two written requests to the bank to continue the case; 3. Fraud on the part of the appellant in the obtention of the two written agreements on request to continue the case.

There is no question but that, under the well established rule of law in this state, nothing else appearing, the delay by the bank in the prosecution of the case, after the institution of the suit, would release appellees. The position taken by counsel is impregnable, but it appears to us equally clear that the written requests of appellees to continue the case amounts to a waiver of any right to rely upon previous negligence in its prosecution. Appellees might have rested upon their rights, refusing to act at all or consent to the delay, in which case they would have been released, but instead of doing this, by the written requests referred to, they actively participated in the management of the case, and cannot now be heard to say that any negligence of which appellant may have been previously guilty shall inure to their release. Appellees were parties to the suit, and consequently were cognizant of all the steps taken in the case, both before and after signing the writings.

From the whole record it clearly appears that there was an earnest effort made, both by appellants and by appellees, to realize something out of the Vingard property. There does not appear, after a careful examination of the record, any fraud or overreaching on the part of appellants. It is more than probably true that Mr. Salmon expressed the opinion, likely as an inducement to the Fords to sign the last writing, that the property would bring more at another sale, but the evidence falls short of showing an absolute promise on his part to that effect. Even if that were true it appears that he was acting in his own behalf, and not as agent for the bank, and that the reliance, if any, was upon his promise in his individual capacity. Independent of this, however, there appears to have been a desire on the part of appellees to have the sale set aside, which of itself strongly tends to the conclusion that the consent to a continuance was not brought about by the promise of Mr. Salmon, the writings referred to being requested to delay proceedings in the action to which appellees were parties, and in refer-

ence to a matter in which they were directly interested, and no consideration to support them.

Wherefore the judgment is *reversed* and cause remanded for further proceedings consistent with this opinion.

Bush & Goodright, A. Duvall, for appellants.

G. W. Whitesides, for appellees.

CHARLES W. MILLER, ET AL., v. THOMAS B. GORHAM'S ADM'X.

Time of Filing Bill of Exceptions.

When a party is allowed until a certain day to file his bill of exceptions, a bill filed on the day until which he has obtained the order is filed in time.

Warranty.

Where a lot of hogs are sold at public auction and the auctioneer announces at the sale that the hogs would be sold without any warranty of soundness, but that any questions asked as to the property would be truthfully answered as far as was known, and the auctioneer promised that the owner would tell all she knew about the hogs, and it is shown that the owner knew that the hogs had the cholera, or that the lot of which the hogs in dispute were a part had it, it was her duty to disclose such fact to a purchaser, and having failed to do so she cannot collect the purchase price of such hogs.

APPEAL FROM NICHOLAS CIRCUIT COURT.

January 18, 1879.

OPINION BY JUDGE ELLIOTT:

Mrs. Lou B. Gorham, administratrix of the estate of Thomas B. Gorham, brought this action on a note executed to her as such administratrix for the sum of \$182.70, due on the first day of September, 1876, and bearing ten per cent. interest after it was due.

The defendant, William M. Miller, Sr., answered and admitted that he is principal on the note sued on; alleged that it was executed for twenty-one head of hogs which, through his agent, he had purchased at plaintiff's sale of stock made in March, 1876.

He says that at the time of said sale the plaintiff caused her auctioneer to publicly proclaim to defendant's agent, who bought the hogs for him, that she did not warrant the hogs to be sound, but that she would disclose all the knowledge she had about them. The answer further states that at the time of the sale the plaintiff knew that the hogs were diseased with cholera, etc. In his rejoinder the

defendant averred that the plaintiff knew that the hogs had the cholera, and did not disclose the fact to defendant's agent, etc.

The first question made by appellee is that the appellants' bill of exceptions cannot be read in the court, because at the close of the trial in the lower court the appellant obtained an order allowing him until the 6th day of the March term, 1878, of the court to produce and file his bill of exceptions, and he did not produce and file his bill of exceptions till on the 6th day of the March term, 1878, and therefore he was a day too late. The appellee contends that the words "until a certain day" does not mean *that* day, but includes the time up to that day. Until a certain day means up to the day, but not to include any part of it.

Suppose that the order had allowed the appellant until the first day of the March term of the Nicholas Circuit Court, 1878, to file his bill of exceptions, and after making this order the fall term of the court had been adjourned as this one did. Could the appellant have filed his bill at all unless permitted to file it on the first day of the March term, 1878? We think not, and we incline to the opinion that when a party is allowed until a certain day to file his bill of exceptions, that a bill filed on the day until which he has obtained the order to file it will be good.

We think that when, on the first day of a term, for instance, a defendant has not his answer ready to the plaintiff's petition, and obtains an order of court extending the time to file it until the second day of the term, an answer filed on the second day of the term would be authorized by the order, and such construction has usually been acted on in the different circuits of the state.

By the second instruction the jury are told that, if they believe from the evidence that plaintiff's auctioneer on the day of sale and before defendant's purchase of the hogs for which the notes were executed, announced publicly within the hearing and presence of the defendants, or either of them, that the stock to be sold by him would be so sold without any warranty of soundness, but that any questions asked as to the property would be truthfully answered as far as was known, and that afterward the defendants bought the hogs for which the note was executed without asking any questions as to the soundness of said hogs, then the defendants are presumed to have purchased on their own judgment and are entitled to nothing under the issue.

We regard this instruction as erroneous. The evidence is abundant that plaintiff knew that hog cholera was amongst the lot of

hogs which she on that day offered for sale, and that several of them had died, and there is evidence conducing to prove that the hogs in dispute were diseased on the day of sale. And one witness proves that the auctioneer promised that they, the plaintiff and her agents, would tell all they knew about the hogs.

Under such circumstances, if Mrs. Gorham knew that the hogs had the cholera, or the lot of which the hogs in dispute were a part had the cholera, it was her duty to make such disclosure to the crowd of bidders, either by herself or auctioneer, and she could not remain away from the place of sale and shield herself of a plain duty behind the auctioneer's statement that she would answer such questions as were asked her, when she was not present to answer any questions, although according to the evidence she was full of information on the subject; and especially should this instruction have been refused when there is evidence conducing to prove that the auctioneer promised that the vendor would disclose her knowledge of the condition of the hogs to the bidders, which was not done.

The record of the proceedings of the fall term of the Nicholas Circuit Court, 1877, was not signed until the first day of its March term, 1878, and it contained in favor of appellants an order granting them an appeal.

On the second day of the March term, 1878, appellants moved to set aside this order granting an appeal, which was refused. It seems that the clerk had made the order without the directions of appellants' attorneys, but we think he was authorized to do so, for they had appeared before him and executed an appeal bond by which they had acknowledged that they had before that time prayed an appeal, and we think the court properly decided that appellants, after having executed an appeal bond, should not be permitted to stultify the admission which its execution implies, by showing that they had not authorized the order for an appeal.

As this suit was brought by the appellee in her fiduciary capacity, and as the counter-claim is against her in such capacity, the defendant can recover on his counter-claim in no event more than the amount of the claim sued on.

The appeal from the judgment on motion to set aside the order granting the appeal is therefore *affirmed*. But on defendant's appeal from the judgment for the amount of the note sued on the judgment is *reversed* and cause remanded for further proceedings consistent with this opinion.

Hargis & Nowell, W. Lindsay, for appellants.

A. Duvall, Ross & Kennedy, for appellee.

LOBRASON & HIELBURN, ET AL., *v.* A. R. MULLINS.**Commissioner's Report of Sale.**

After a sale has been reported to and confirmed by the chancellor, he has no power, at a subsequent term, to hear exceptions or to permit, without consent, the commissioner to amend his report.

APPEAL FROM KENTON CHANCERY COURT.

January 21, 1879.

OPINION BY JUDGE PRYOR:

At the date of the confirmation of the commissioner's report, the plaintiffs in the several attachments were the purchasers of the land, and after confirmation the chancellor had no power at a subsequent term to hear exceptions or to permit, without consent, the commissioner to amend his report.

The commissioner, when selling the land, was not presumed to know whether Hewitt was the attorney for one or all of the parties, and made his report, no doubt, on the idea that he was the attorney, or authorized to bid for all; and the only manner in which he ascertains a different state of case to exist was from the information of those, including the appellee, who take issue with appellants on that question. This case shows the necessity of having an end to litigation and preventing any interference with final judgments by mere motion in the same case, so as to change the rights of the parties. The report of the commissioner was not a mere clerical misprision. He made the report because he believed, and had the right to believe, that Hewitt was representing all the plaintiffs; and whether so or not, it is now too late in this form of proceeding to make inquiry as to the action of the commissioner. That he acted in good faith and upon grounds authorizing such action is manifest from the proof. We do not mean to decide that Hewitt was authorized to make the bid. This question is not before us, but what we do mean to decide is, that such an issue cannot be raised by exceptions after confirmation at a subsequent term of the court, when the court ceases to have any power over it, and that all the proceedings thereafter are not only irregular but absolutely void. The plaintiff, Mullins, had no right to have the land sold to satisfy his individual claim, and if his position with reference to the other plaintiffs in the action is maintained, it must be by an original pleading.

The appellants moved to set aside the order sustaining the exceptions or authorizing the supplemental report. This motion was based upon the want of jurisdiction (or at least this was one of

the grounds), and the court, declining to dispose of the case on that ground, has heard proof on an additional exception to the effect that Hewitt was authorized to make the bid, and adjudging that he was not, has subjected the land to the payment of appellee's debt. The fact that the appellee tendered such an issue by a mere exception to the order changing the original report did not give the court jurisdiction, and particularly when the appellants were insisting that the court had no power over the original judgment and the report made under it. This view of the question needs no authority in support of it, and the judgment subjecting the land to sale for Mullins' debt, as well as the sale, should be disregarded, and the order filing the supplemental report set aside. The judgment on the case the first time is *reversed* and cause remanded for further proceedings consistent with this opinion. Appellants entitled to judgment for costs. The second appeal is dismissed without prejudice. Appellants will pay the cost of that appeal.

Stevenson & O'Hara, for appellants.

I. F. and C. H. Fish, for appellee.

ROBERT SCOTT'S EX'R v. ORA LEE SCOTT, ET AL.

Purchaser at Executor's Sale.

Where a will empowers an executor to sell real estate and the executor became the purchaser at his own sale, he cannot be heard to question the power to sell some two years after the sale merely because he has become dissatisfied with his purchase.

APPEAL FROM NELSON CIRCUIT COURT.

January 21, 1879.

OPINION BY JUDGE HINES:

Appellant, on the 31st day of October, 1876, filed a petition for the settlement of the estate of Robert Scott, deceased, alleging that he had been named executor in the will; that, the personal property being insufficient to pay the debts, he had under power granted in the will sold, on the 25th day of October, 1876, 261 acres of the land, and that he became the purchaser himself at the price of \$52.87 per acre, on a credit of six, fifteen and twenty-four months. On the 23rd day of October, 1877, a rule was awarded against appellant requiring him to pay to the commissioner and receiver appointed in the case the proceeds of the personal property sold by him, and the first installment then due upon the land purchased by him as stated.

Subsequently the commissioner filed report setting forth the sale of the land by the executor to himself and his inability to get him to settle as directed by order of court. On the 23rd day of February, 1878, judgment was rendered confirming the last report of the commissioner, and adjudging that appellant pay to the commissioner certain sums received by appellant from the sale of the personal property, and the several installments then due on the land purchased. On the 3rd of June, 1878, appellant moved the court to relieve him of the purchase of the land, and among other things claimed that he had no authority under the will to sell, and that he did not, therefore, get a good title. To this motion all the parties in interest objected, and the court overruled the motion.

We are unable to perceive any reason why the judgment of the court below should be disturbed. The will gave the executor power to sell any or all of the land and real estate. He became purchaser at his own sale, reported it to the court, and took no step to be relieved of his purchase until some two years after the sale. But he would not be heard at any time to complain. He made the purchase at his own price; no shadow of defect appears in the title, and no reason can be conceived for dissatisfaction with the purchase unless it be the depreciation in the value of property since the purchase was made.

Judgment affirmed.

E. E. McKay, for appellant.

Muir & Wickliffe, F. D. Cosby, for appellees.

ELIZABETH FUHRING *v.* LOUISVILLE WATER COMPANY.

Mandamus.

A water company holding a franchise to furnish the city of Louisville and its inhabitants water and furnish an adequate supply of water for sprinkling the streets of said city may be mandated to do so, but this can only be done by a plaintiff showing himself entitled to have such water; and a plaintiff cannot maintain an action to force the company to furnish water for sprinkling a street when she does not aver that she resides on, does business or owns property on the street for sprinkling which she requires water.

APPEAL FROM JEFFERSON COURT OF COMMON PLEAS.

January 21, 1879.

OPINION BY JUDGE COFER:

Without intimating an opinion as to their correctness, we assume, for the purposes of this case, that the following propositions are

correct: 1. That mandamus will lie at the suit of any one legally interested therein to compel a corporation, such as the Louisville Water Company, to discharge any duty imposed on it by law whenever there is no other clear and adequate remedy by which the performance of such duty can be enforced. 2. That said corporation is bound to furnish an adequate supply of water for sprinkling the streets of Louisville.

The corporation was created to furnish the city and its inhabitants with water. With its obligations to the city we have no concern in this case. The obligation to furnish water to the inhabitants, whatever else it may import, does not bind the company to furnish water to the inhabitants, except to each for his own use.

There is a clause in the charter giving to the company the exclusive right to furnish water to the inhabitants of the city if the authorities thereof shall agree thereto. But it does not appear whether the city was so agreed or not; nor is that important, as we are proceeding on the assumption that the company is not only bound to furnish individuals with the water necessary for the use of each, but is also bound to furnish water to sprinkle the streets.

But upon what ground can the appellant claim that water for that purpose shall be furnished to her? She does not allege that she resides, does business or owns property on any of the streets for sprinkling which she requires water, and she does not therefore seem to have any immediate interest in having them sprinkled. She shows no right that might not be shown by any other inhabitant of Louisville. Suppose that one or more persons besides herself had applied as she has done, and as they had a right to do, who shall decide which of them shall be supplied. The company is certainly not bound to furnish all applicants who may come; and as the duty of furnishing the supply rests on the company, and no tribunal has been designated to decide between several applicants, the company must necessarily decide the question. And as it has the power to decide, the court has no authority to control the exercise of that right by mandamus.

It is not pretended that the company has or will refuse to furnish water to any one to be used to sprinkle these or any other streets in the city. On the contrary, the gist of the appellant's complaint seems to be that the company is about to furnish water to another for the very purpose for which she seeks to compel it to furnish water to her. Upon what ground does her superior right rest?

She alleges that, "having made contracts with a number of the

property owners and residents" on the streets named; she desires the water to enable her to comply with these contracts. Waiving the criticism that this is a mere recital rather than an allegation of the fact, the petition is still open to the objection that she does not claim to have made such contracts with all the occupants of these streets, or even with a majority of them.

For aught that appears some other person or persons may have similar contracts with an equal or greater number of persons on the same streets. If this be the case and appellant is entitled to a mandamus, the others would have the same right, and thus several might be at the same time receiving water under compulsory process for sprinkling the same street. That this might lead to confusion and waste is obvious.

Moreover, as already intimated, the appellant has no interest that the streets shall be sprinkled at all. Her only interest is that she may make gain by speculating in the water, buying it from the company and putting it on the streets, thus making profit.

If the company was refusing to furnish water to any one to be used in sprinkling, or would only furnish it to persons who would charge an exorbitant rate, there might be ground for complaint, but such complaint could only be made by the occupants of the streets or owners of property thereon. They and they alone would be injured.

That she has carts that are not suited to any other use cannot affect the question. It was her folly to procure them for such a purpose without first knowing that she was entitled to demand a supply of water, and cannot give her any better right than she would have if she did not have them.

The judgment of the court of common pleas was right and is affirmed.

Elliott & Atchison, Russell & Helm, for appellant.

Barrett & Powers, for appellee.

PRIREY & SANDERS v. W. F. CONWAY'S ADM'R.

Demand Before Suit—Estates.

The failure to make requisite preliminary proof and to demand payment before commencing suit against a personal representative on a demand due from the decedent must be taken advantage of by affidavit and rule.

APPEAL FROM NICHOLAS CIRCUIT COURT.

January 23, 1879.

OPINION BY JUDGE COFER:

The affidavit of the appellants was not sufficient, as was decided in *Leach v. Kendall's Adm'r*, 13 Bush 424.

But as said in *Thomas' Ex'r v. Thomas*, 15 B. Mon. 178, "The cause of action was complete, and the petition would be good without" an averment of demand accompanied by the required affidavit. And the court there laid down the rule that has ever since been followed, that the failure to make the requisite preliminary proof and to demand payment before commencing suit against a personal representative on a demand due from the decedent must be taken advantage of by affidavit and rule. In that case the defendant answered, and a trial was gone into before the objection for the want of the required affidavit was taken, and the court held that it came too late, and intimated it should have been taken before answer, and such we believe has since been the uniform practice. See also *Rogers v. Mitchell*, 1 Met. 25. This is a reasonable and convenient rule and we think ought not to be departed from.

That the demand shall be proved and presented for payment before suit is brought is merely intended to enable the personal representative to pay it if he chooses without suit, and when he has answered to the merits it is rendered certain, if he is to be credited with good faith, that he would not have paid it if demand had been made accompanied by proper proof and affidavit, and it is thus shown that the interest of the decedent's estate has not been prejudiced by the omission. The personal representative may, therefore, waive such proof and demand when he means to contest the claim, and when he answers without taking the objection he should be deemed to have waived it.

But the statute also goes on to declare that no recovery shall be had until such affidavit is made (Sec. 37, Art. 2, Chap. 39, Gen. Stat.), and that no demand against a decedent's estate shall be paid by, or allowed as a credit to, a personal representative which is not verified by affidavit as required by its provisions. This is required in order to purge the conscience of the claimant, and cannot be waived by the personal representative; and it is error to render a judgment against him, even though he should make default, unless the record shows that the required affidavit has been made. *Worthley's Adm'r v. Hammond*, 13 Bush 510.

The only benefit to the estate which can result from requiring

affidavit, proof and demand before suit is that, if so inclined, the personal representative may pay it and avoid the costs of a suit.

When the personal representative intends not to pay because he does not believe the demand is legal and just, nothing is lost to the estate by failure to make the demand accompanied by the proper proof and verification; and hence there is no reason why in such a case he may not be permitted to waive it.

But something of advantage to the estate may be disclosed by the affidavit of the claimant, and as it is impossible for the personal representative to know until the affidavit is made what it may disclose he ought not to be allowed, much less be presumed, to waive it.

The appellee's plea of another action pending cannot bar this appeal. This court cannot enter into an inquiry such as would become necessary on an issue of that kind. We must act upon the record as we find it, and cannot affirm an erroneous judgment or dismiss an appeal on account of facts occurring after the judgment appealed from was rendered, and which in no way affects the status of the parties in court.

Judgment *reversed* and cause remanded with directions to overrule the motion of the appellee, and for further proper proceedings.

Hargis & Nowell, for appellants. Ross & Kennedy, for appellee.

M. D. BURGESS' EX'RS, ET AL., v. NED JACKSON.

Construction of Terms of a Will.

Where in his will a testator states "I give the same forever to the following parties, or their heirs, who were once my slaves under the laws of Kentucky, viz.: Ned Jackson, Cordelia, wife of Marshall's Dan, and her children, and Harriett and her children" (describing certain property), it is held that the property bequeathed was to be taken in three parts only, one to Jackson, one to Cordelia and one to Harriett.

APPEAL FROM MASON CIRCUIT COURT.

January 24, 1879.

OPINION BY JUDGE COFER:

Referring to his residuary estate the testator says: "I give the same forever to the following parties, or their heirs, who were once my slaves under the laws of Kentucky, viz: Ned Jackson, Cordelia, wife of Marshall's Dan, and her children, and Harriett and her children."

There is nothing in the codicil which seems calculated to explain or alter the above clause. The exact meaning and intention of the

testator is not readily perceived, and no power of analysis we have been able to bring to bear upon his language has enabled us to say with confidence what his intention was. This much only seems to be clear, that he intended that Ned, Cordelia, Harriett, and the children of the latter two should be sharers in his bounty.

But the impression made on the mind when reading the will in the light of the facts stated in respect to the relation of the beneficiaries to the testator is that he contemplated them as three distinct objects of his munificence. Ned being one, Cordelia and her children another, and Harriett and her children still another.

Ned, Cordelia and Harriett had been his slaves, and all the children except two of Cordelia's were also his slaves. Mary Elizabeth was born in July, 1865, before slaves were manumitted by the adoption of the 13th article of amendment to the Constitution, and the child next older than Mary was born in 1862.

The will is not dated, but from the facts and circumstances it is reasonable to assume that the testator knew the names of all the children of the two women born before the will was written, and all were born before the codicil was made, and he may be safely assumed to have then known their names, and if he had designed to make the children equal sharers not only with their respective mothers but also with Ned, it is probable he should have made his intention plain by inserting the names of all in a way to have clearly indicated that intention.

This, it is true, is little better than speculation, but from the language used and the structure of the sentence we can do no better than to judge from it and the relation of the testator to the parties what would have been natural and reasonable under the circumstances, and then assume that as his intention.

Ned and the two women had no doubt been faithful servants. The will is strong evidence of that. They had probably assisted him to accumulate or save the estate he was devising to them, and it was natural that he should regard Ned as one object of his bounty, and each woman and her children another.

At any rate we are not able to say that the reasons for adopting the construction contended for by the appellants are greater than those in favor of the construction given by the court below, and the judgment will therefore be *affirmed*.

W. H. Wadsworth, for appellants.

Barbour & Cochran, W. H. Wadsworth, Jr., for appellee.

BOARD OF FOREIGN MISSIONS, ET AL., v. SARAH LOGAN'S ADM'R,
ET AL.**Construction of Will.**

Where a will provides that certain described land shall be equally divided between the testator's four children, stating that "I wish the property entailed to them and their heirs, and should either of my children die without issue, I wish the portion that might have fallen to the deceased to be equally divided among the others above named," it was held that each of said children named took an absolute fee in the land devised.

APPEAL FROM SHELBY CIRCUIT COURT.

January 24, 1879.

OPINION BY JUDGE HINES:

This case presents for construction the following provision of the will of James Logan: "The balance of my land I wish equally divided between my four following children, Sarah Logan, Ann M. Logan, Benjamin H. Logan and Gordon Logan; the two-thirds of my negroes I wish equally divided between my four children above named. When land or negroes or both are devised to my children, by this will, I wish the property entailed to them and their heirs, and should either of my children die without issue, I wish the portion that might have fallen to the deceased to be equally divided among the others above named."

Under the provisions did Sarah Logan take a life estate or a fee simple title in the land mentioned? It appears to us quite clear that the testator intended to create an estate-tail. He must be presumed to have used words according to their well established and commonly recognized meaning. The expression, "I wish the property entailed to them and their heirs," can receive but one construction. The use of the word "heirs" cannot alter the meaning, but upon the other hand is restricted in its application by the expression "entailed" to "heirs of their bodies," as is shown to have been the intention of the testator by the use of the expression, "should any of my children die without issue," etc. The will was written in 1829 and admitted to probate in 1847, and therefore is to be construed with reference to the law as it existed prior to the adoption of the Revised Statutes. When so construed, by the light of numerous decisions of this court, the conclusion is necessarily reached that Sarah Logan took an absolute fee in the land devised to her in the will of James Logan. *Breckenridge and Wife v. Denny & Faulkner*, 8 Bush. 523.

Wherefore the judgment is *reversed* and cause remanded with directions for further proceedings consistent with this opinion.

Bullock & Beckham, for appellees.

Caldwell & Harwood, for appellants.

S. S. LANCASTER, ET AL., v. JOHN J. SMOOT, ET AL.

Attachment—Evidence to Sustain.

Where there is sufficient evidence to sustain a charge that a defendant was attempting to fraudulently dispose of his property to defraud his creditors, the error of the trial court, if it was error in overruling exceptions to certain questions seeking to prove the same facts, is not reversible in this court.

Second Judgment on Same Debt.

An appellant cannot ask the Court of Appeals to set aside a second judgment for the same debt where he failed to move in the trial court to set it aside.

APPEAL FROM BATH CIRCUIT COURT.

January 24, 1879.

OPINION BY JUDGE HINES:

Appellants have not placed themselves in a condition to authorize us to review the action of the court below in rendering the second personal judgment in favor of appellees. Under the authority of *Bethel v. Bethel*, 6 Bush 65, the second judgment on the debt is void; but it cannot be disturbed by this court because no motion was made in the court below to set it aside. Sec. 763, Civil Code. This, however, does not interfere with an inquiry into the rulings of the court in sustaining the attachments. The charge that appellant was attempting fraudulently to dispose of his property for the purpose of defrauding his creditors is supported by the evidence. The testimony of Land alone is sufficient for that purpose.

It is unnecessary to inquire whether the court erred in overruling exceptions to questions 12, 20 and 25 of Smoot's deposition, for, as we have stated, the evidence of Land alone supports the finding, and besides the questions do not bear upon the evidence of Land.

The judgment correctly directs the sale of the personalty attached and then the sale of the realty to satisfy the debts. But if the judgment did not so direct there would be no cause of complaint, as the evidence tends to show that other liens and exemptions would con-

sume the personalty. There is nothing in this connection to show that the substantial rights of appellants have been prejudiced.

Judgment affirmed.

J. M. Nesbitt, R. Gudgell, for appellants.

Reid & Stone, for appellees.

JAMES R. RENFROE *v.* S. H. BOLES.

Consideration of Note.

Where a debtor seeking to be discharged in bankruptcy is met by a creditor, who resists such discharge, and the debtor gives to his creditor a note for the amount of his claim, in consideration that he will cease to resist such discharge, such note is without consideration and is not collectable. The consideration of the execution of the note is against public policy, and is immoral and void.

APPEAL FROM BARREN CIRCUIT COURT.

January 25, 1879.

OPINION BY JUDGE ELLIOTT:

Appellee sued appellant on two promissory notes, one for two hundred dollars and the other fifty dollars. Appellant admitted the execution of the two notes, but alleged that in December, 1868, he had filed his petition in the United States District court at Louisville for a discharge in bankruptcy; that appellee, being one of his principal creditors, appeared in the bankrupt court and resisted his discharge; that to induce appellee to withdraw his opposition to his discharge in bankruptcy he executed the two notes sued on; and that in consideration of the execution of such notes the appellee did withdraw his opposition to appellant's discharge, and so appellant said this was the only consideration for the notes sued on. Soon after their execution in 1869, appellant obtained his discharge in bankruptcy.

The appellant's plea was not controverted by the appellee, and on hearing a verdict resulted in appellee's favor by reason of a peremptory instruction of the court to find for him, and judgment being rendered in his favor the appellant seeks a reversal.

If the grounds set up by appellee against the discharge of appellant in bankruptcy had been adjudged sufficient for such purpose, they would have inured to the benefit of all of appellant's creditors, and as these grounds necessarily assailed the moral status of the appellant in the bankruptcy court, the withdrawal of them in con-

sideration of the execution of the notes sued on was against public policy; and the notes tainted with such immoral consideration cannot be enforced.

Besides, by Section 35, Bankrupt Law, all contracts made with a creditor to induce such creditor to forbear "opposing the application for discharge of the bankrupt, shall be void." The defendant also alleged that the \$50 note was executed without any consideration, being executed for his own property.

As the appellee did not deny the allegations of the defendant's plea, they should have been taken as true, and the jury instructed to find for the appellant; and the peremptory instruction to find for the appellee was erroneously prejudicial to appellant's rights.

Wherefore the judgment is *reversed* and cause remanded for further proceedings consistent with this opinion.

T. B. McIntyre, for appellant. G. W. Craddock, for appellee.

V. WICKWARE v. ADELIA A. THOMPSON.

Contract of Married Woman.

A contract to pay money to a married woman is as valid as a contract to pay to any other person, and one who has borrowed and received money from her cannot be heard to say that his contract to repay her is not binding upon him because of her coverture.

APPEAL FROM SIMPSON CIRCUIT COURT.

January 28, 1879.

OPINION BY JUDGE COFER:

A contract or agreement to pay money to a married woman is as valid as a contract to pay money to any other person. When it is sought to charge her personally on her contract a very different question is presented. Certainly one who has borrowed and received money from her cannot say that his contract to repay her is not binding upon him because of her coverture.

That the administrator dismissed his cross-action after the cause was submitted in no way prejudiced the rights of the appellant. Nor were his rights prejudiced by the filing of the amended petition; and besides, there was no abuse of discretion in allowing it to be filed.

The note was payable to the appellee, and whatever might have been the rights of the administrator and the creditors of Dr. Thompson, the administrator is asserting no claim, and if the appellant

pays the debt to the appellee, he will have a good acquittance, and that is all he has a right to ask.

The only defense entitled to consideration is the alleged alteration of the note. On that question the evidence was conflicting; and this court treats the finding of the court below in such a case as it would the verdict of a jury properly instructed.

Wherefore the judgment is *affirmed*.

J. M. Galloway, for appellant. F. Lee Wilkinson, for appellee.

HENRY C. HART *v.* GEORGE DIGGS, ET AL.

Fraud in Sale of Real Estate.

Where it is shown that the family physician of a poor colored man, of a weak mental nature, the physician having great influence over him, sells to such patient a house and lot for more than double their value, the purchaser being intoxicated at the time, the chancellor will refuse to sustain the application of the seller for specific performance.

APPEAL FROM CLARK CIRCUIT COURT.

January 29, 1879.

OPINION BY JUDGE ELLIOTT:

This action was brought by appellant on the asserted contract of appellee to pay him \$600 for a house and lot in Winchester, Ky., \$350 of which was due at the beginning of this action, and the balance fell due during its progress.

The defense set up is the incapacity of appellee, at the time he signed the contract, to understand its nature and effect by reason of his intoxicated condition at the time, and which condition of mind he says was superinduced by the fraud of appellant in furnishing him the whisky and making him very drunk for the purpose of selling him the house and lot at largely more than their real worth, and on which he was successful. He further states that appellant has not a good title to the land.

The suit was brought at law, but was properly transferred to equity because it was substantially a suit for specific execution of the contract by the appellant and of rescission of the contract by the appellee. On these issues much evidence was taken, and on hearing the lower court dismissed the plaintiff's petition, and he appeals.

The evidence as to the mental condition of appellee, or as to whether he was intoxicated at the time the contract was executed, is conflicting; but the evidence does establish the fact that appellant

had been the family physician of appellee and had influence over him, and that he, the appellee, had a pliant disposition, easily controlled but feeble intellect, or intellect below the average negro. It was also in evidence that on the day of the contract he was drunk, which fact is contradicted by appellant and one or two witnesses. But the fact that appellant sold the house and lot to this ignorant confiding colored man at more than twice their worth, and that he was his family physician and as such had considerable influence with the colored man, who was of a weak nature, are fully established by the evidence. Besides, the title of appellant was put in issue, and he only shows by way of title the deed of Massie and wife.

Before the court was authorized to enforce a specific execution of the contract the appellant should have shown a derivation of title from the commonwealth, or such a length of possession, claiming the property as his own, as would place his title beyond dispute. This he did not do.

The lower court dismissed appellant's action with far superior advantages to this court as to the character and standing of the witnesses who testified, most of whom were colored people, and we cannot say that the judgment was erroneous on either issue made by appellee. The sale of the house and lot to an ignorant colored negro at twice their worth so soon after keeping open house and entertaining and making the colored boy very drunk, together with the evidence of appellee's condition at the time of the contract, fully authorized the court to refuse the relief asked by appellant, and on the other hand to dismiss his action.

Wherefore the judgment is *affirmed*.

Houston, Tucker & Buckner, for appellant.

L. Hathaway, for appellees.

A. O. ROBARDS v. GEORGE ALLEN, ET AL.

Malice Upon Plea of Justification in Libel.

Malice, upon a plea of justification filed as an answer is not required to be proven. Such an issue places upon the defense the burden of showing the truth of the charge made, and if he fails a recovery must be had against him.

APPEAL FROM MERCER CIRCUIT COURT.

January 30, 1879.

OPINION BY JUDGE PRYOR:

It is evident that the parties below treated the answer as a plea of justification, and if not, the charge stood undenied with the allegation in the answer that the female appellee made the statement constituting the libel, and knew when she made it that it was false. The court, under the pleadings, instructed the jury that if the goods were obtained under false representations and with the intent to defraud, they must find for the defendant. Counsel for the defendant was permitted to conclude the argument of the case, against the objections of the plaintiff; and after taking the chances upon the issue presented by a defective answer, the appellant cannot now be permitted to avail himself of the error against the plaintiff for the purpose of obtaining a reversal. The appellant attempted to make good the charge, and must abide the result. The petition, it is true, alleges that the defendants were partners; still that pleading seeks to make them individually liable. The two defendants, it is alleged, caused the libel to be published, and its publication is established by the proof that the appellant caused it to be written by Cardwell, and at his (the appellant's) special instance the words, "as they were gotten under false pretenses," were inserted. The letter cannot be regarded as having been written in the discharge of a legal, moral or social duty, but was written to this appellee for the purpose of notifying her that if the money was not paid she would be prosecuted for obtaining goods under false pretenses. No confidential relation existed between the parties, and the only legal or social duty resting upon the appellant was to have the appellee arrested and tried if she had been guilty of such a high offense. Malice upon a plea of justification filed is not required to be proven. Such an issue places upon the defense the burden of showing the truth of the charge made, and if he fails a recovery must be had.

If this is not a plea of justification it admits all the allegations of the petition, and no proof was necessary, the jury having to inquire only as to the amount of damages. Nor can we regard the answer in mitigation of damages, as it expressly alleges that this appellee had no authority to buy the goods and have them charged to Morgan, and that she knew she had no such authority when she made the purchase. While the averment that the goods were obtained and the representations made with the intent to defraud the appellant is not to be found in the answer, still it is an attempt to justify with no mitigating feature in it, and the appellant having

had the benefit of his plea has now no right to complain. The instructions given by the court presented to the jury the whole law of the case, and the judgment must be affirmed.

A rehearing having been granted in this case, the former opinion is again adopted and the judgment is now *affirmed*.

Thompsons & Hardins, for appellant.

P. B. Thompson, Jr., Kyle & Poston, T. C. Bell, for appellees.

REUBEN POWELL v. WESLEY SEBREE, ET AL.

Description of Land in Judicial Sale.

Where land is not particularly described in a judgment ordering its sale, it will be ground for reversal when presented on appeal, but will not be considered as a ground for reversal when the appeal is from an order confirming a report of sale.

APPEAL FROM SCOTT CIRCUIT COURT.

January 30, 1879.

OPINION BY JUDGE COFER:

The objection that land adjudged to be sold is not particularly described in the judgment will, when presented on appeal from the judgment directing the sale, be ground for reversal; but when the appeal, as in this case, is from the order confirming a report of sale, a totally different question arises. The judgment still remains in force, and the question on exceptions to the report of sale for defects in the judgment is not whether the judgment is erroneous, but whether it is void; and if it be not void then it is conclusive when thus collaterally attacked.

The judgment describes the land as the same described in the petition. That description would be sufficient in a deed to pass the title, and though not such as ought to have been given, is sufficient to uphold the sale.

That the land may have been sold for an inadequate price is not alone sufficient to authorize the setting aside of the sale.

Judgment *affirmed*.

A. Duvall, for appellant. George E. Prewitt, for appellees.

CITY OF HOPKINSVILLE v. W. H. PELTON.

Objection Required Before Exception.

A party cannot except to a decision made at the instance of the adverse party unless he had made objection to the motion, offer or request of the adverse party; and where an instruction is given at the instance and on the motion of the appellee without objection by appellant his exceptions to the decision of the court thereon will be insufficient to bring them before the court for review on appeal.

APPEAL FROM HOPKINS CIRCUIT COURT.

January 30, 1879.

OPINION BY JUDGE ELLIOTT:

Four objections are made to the judgment in this case: 1. That the damages given by the jury are excessive and were given under the influence of passion and prejudice; 2. The verdict of the jury is not sustained by sufficient evidence, and is contrary to law; 3. The court erred in refusing to instruct the jury as asked by the defendant, which error of the court was excepted to at the time; 4. The court erred in the instructions given to the jury to which defendant excepted at the time.

After a careful reading of the record we are of opinion that the verdict and judgment are neither excessive or unsupported by sufficient evidence. As to the third and fourth errors assigned, they cannot be noticed for the following reasons: By Sub-secs. 1, 2, and 3, Sec. 333, Code of 1877, it is provided that "an exception is an objection taken to the decision of the court on a matter of law." A party may, without previous objection, except to a decision against him, unless it be made at the instance of the adverse party. But a party cannot except to a decision made at the instance of the adverse party unless objection shall have been made to the motion, offer or request of the adverse party.

The instructions assailed as erroneous by the third and fourth assignment of errors were all except one given at the instance and on motion of the appellee, and his motion to and request of the court to give the instructions were not objected to by appellant. It is true that the decision of the court allowing those instructions to go to the jury was excepted to by the appellant, but the code does not permit such decision to be excepted to unless the motion, offer or request on which it was made has been objected to by the party excepting to the decision.

As the instructions excepted to except one were given at the instance of and on motion of appellee without objection by appellant, his exceptions to the decision of the court on such instructions are insufficient to bring them before us for review.

The instruction offered by appellant was properly rejected by the court. Wherefore the judgment is *affirmed*.

Campbell & Ferguson, Phelps & Son, for appellant.

Lander & Clark, for appellee.

ROGER S. DIXON v. JOHN POSEY.

Consideration.

Where a sister, at the instance of her brother, left her home and went with him to another state, and while there performed valuable services for him, such services constitute a sufficient consideration to uphold a note executed to such sister by the brother.

APPEAL FROM HENDERSON COURT OF COMMON PLEAS.

February 1, 1879.

OPINION BY JUDGE ELLIOTT:

In the autumn of 1871, Dr. R. S. Dixon, the appellant, a resident of Indiana, came to Henderson, Kentucky, the home of his sister, Sue B. Dixon, and solicited her to accompany him to his house in the state aforesaid and assist in its care and management, he having before that lost his wife by disease and death.

His sister accompanied him to his home and became his housekeeper, and remained with him and discharged all the duties pertaining to the household, such as cooking, laundry, labors, and such other employments as pertained to her position as housekeeper, until the 12th of March, 1872, when she began her return journey to her home in Kentucky.

As may be presumed, her brother appreciating her valuable services and animated by a brother's generous nature and love for a sister, voluntarily executed and delivered to her his note for \$500. His sister having returned to Kentucky and won the heart of a youthful Posey, became his wife and concluded to invest the note on her loving brother in a small tract of land as the foundation of the fortune that she hoped would be hers in the future.

Her assignee, John Posey, being refused payment of the note by the appellant, brought this action and attached his lands in Hender-

son for its payment. Appellant appeared to the action, and for answer admitted the execution of the note, but said that a big drunk with which he was then afflicted prevented the full operation of his mental machinery, and that in fact he did not understand the effect of his act in the execution and delivery of the note to his sister, and as a distinct allegation and defense he relied on the fact that the note was without any consideration to support it.

On these issues the parties went to trial, and although the appellant proved that drunkenness was his usual habit, and sobriety the exception, the jury on proper instructions found for the appellee, on which verdict judgment was rendered, from which Dr. Dixon has appealed.

The grounds on which he asks a reversal is that the note was executed without a sufficient consideration. In fact, at the close of the evidence the appellant asked the court to instruct the jury that if they believed from the evidence that the note was executed without consideration they should find for him. This instruction was properly refused. The trip of appellant's sister to Indiana at his solicitation was a sufficient consideration to uphold the contract evidenced by the note, especially when she remained and performed services for him from the autumn of 1871 to March 12, 1872.

We do not decide that the kinship of the parties was sufficient to uphold the executory contract sued on. But when, as in this case, a sister has left her home at her brother's solicitation and gone with him to another state, and while there performed valuable services, constitutes a sufficient consideration to uphold a note executed to such sister.

Wherefore the judgment is *affirmed*.

Balt & Eaves, Wm. Lindsay, for appellant.

J. R. Dabney, M. Yeoman, for appellee.

JOHN D. KINNAIRD, ET AL., v. SAMUEL SHANNON.

Sheriff's Return Conclusive.

Where land is levied upon and sold by the sheriff, all that as a matter of law constituted a part of the land was embraced in the levy and sale, and the legal effect of the sheriff's return could not be enlarged or restricted by parol evidence. In such a case the return is conclusive on the parties to the writ.

When Chattels Are Regarded as Fixtures.

When chattels are attached to the realty or adapted to use in connection with the purpose for which the premises are being used and for which they are specially adapted, such chattels must be regarded, between vendor and vendee, as fixtures.

APPEAL FROM METCALFE CIRCUIT COURT.

February 1, 1879.

OPINION BY JUDGE COFER:

The real question in this case was whether the screws were such fixtures as would pass by a conveyance of the land without other words in the deed than such as were sufficient to pass the land itself. The sheriff returned that he had levied on and sold the land, and whether the screws passed with it depended upon their relation to the land, and not upon the purpose, intent, or understanding of the sheriff who made the levy and sale. There was no ambiguity in the return. The land was levied on and sold, and, as matter of law, all that constituted part of the land was embraced in the levy and sale, and this legal effect of the return could not be either enlarged or restricted by parol evidence.

In such a case the return is conclusive on the parties to the writ. Nor could the rights of the purchasers be affected by the declaration of the sheriff made to Quinsberry after the property had been knocked off to the plaintiffs in the execution.

The court therefore erred in permitting Skaggs to testify that he did not levy upon or sell the screws, and that he so notified Quinsberry after the sale was over.

In *Thompson v. Morris*, 2 B. Mon. 35, there was a motion to quash the return or compel the sheriff to amend his return. That was a direct proceeding to correct a false or fraudulent return, whereas this is a collateral proceeding in which, while the return is left in full force, it is attempted to restrict its legal effect by parol evidence.

Whether the screws were fixtures is a question of more difficulty. As we understand the evidence they were attached to a frame which was attached to the freehold, but this is not always decisive. Nor is actual attachment to the freehold always essential to constitute a fixture.

The question whether chattels are to be regarded as fixtures depends less upon the manner of their annexation to the freehold than

upon their own nature and the use to which they are applied. *Jones v. Lusk*, 2 Met. 356. When attached to the realty or adapted to use in connection with the purpose for which the premises are being used and for which they are specially adapted, chattels must be regarded, between vendor and vendee, as fixtures.

The witnesses speak of the building as a "factory," and the evidence does not show that the building or the premises were used for any other purpose; the house was erected and the screws were put up before the appellee purchased, and he purchased the whole together, and the screws had remained in their original place and were used up to the time the sheriff went to execute the writ of habere facias. True, they are specially named in his deed, and while this may show that the parties then supposed they did not constitute part of the freehold, the fact that they were put in when the building was erected, and were continued there and sold with the land, and are used in connection with the handling or manufacture of tobacco, for storing which the building was erected and used, make them a part of the realty. These facts were undisputed, and whether they were fixtures was a question of law which should have been decided by the court. The court erred in the instructions given to the jury; but as they were not objected to we cannot reverse on that ground. We have thought proper, however, as the case must go back for the error in admitting the evidence of Skaggs, already adverted to, to lay down the law governing the case that it may be retried upon what we regard as correct legal principles.

Judgment *reversed*, and cause remanded for further proper proceedings.

L. McQuown, for appellants.

A. Duvall, Compton &c., for appellee.

JOHN T. TERRY'S G'D'N *v.* B. B. TERRY'S ADM'R.

Recovery of Costs.

When a plaintiff succeeds in his action, either at law or in equity, he is entitled to his costs as against the parties over whom he has been successful.

APPEAL FROM CRITTENDEN CIRCUIT COURT.

February 1, 1879.

OPINION BY JUDGE ELLIOTT:

The errors assigned by the appellant only raise the question as to whether the court below erred in adjudging against the appellant a part of the cost incurred by him in the prosecution of his action.

The suit was by appellant, as guardian of J. T. Terry, against appellee, as administrator of B. B. Terry, who was formerly guardian of J. T. Terry.

The appellant did not join his ward with him in the action, but there was no objection to the non-joinder.

By Secs. 12 and 13, Chap. 26, General Statutes, it is substantially provided that when a plaintiff succeeds in his action, either at law or equity, he is entitled to his costs as against the parties over whom he has been successful.

There was no objection to the trial of this suit in equity and the plaintiff should have been adjudged his entire cost. Wherefore the judgment is *affirmed*, except the judgment against appellant for costs, and that judgment is *reversed* and cause remanded for further proceedings consistent with this opinion.

J. W. Blue, for appellant. Sumner Marble & Son, for appellee.

JOHN CAIN v. COMMONWEALTH.**Criminal Law—Appeals.**

The granting of an appeal in felony cases from a final judgment of conviction is a matter of right, and not a mere matter of grace with the court.

When Criminal Trial Ends.

Within the meaning of the criminal code a trial is not over until the motion for a new trial is overruled and the sentence is passed.

Admission of Evidence.

When the bill of exceptions fails to show what response was expected from the witness, this court cannot say that the appellant has been prejudiced by the action of the court in refusing to allow the witness to express his opinion. Counsel should have stated to the court what they hoped to prove by the witness, and that should have appeared in the bill.

APPEAL FROM LINCOLN CIRCUIT COURT.

February 4, 1879.

OPINION BY JUDGE HINES:

The granting of an appeal, in felony cases, from a final judgment of conviction is not a matter of grace with the court below, but of absolute right in the accused of which he cannot be deprived if the necessary steps are taken in time. Such appears to have been the opinion of the court below, but the refusal to grant an appeal seems to have been based upon the idea that the accused applied too late.

In considering the questions suggested by counsel for appellant we are without aid from the counsel representing the commonwealth, either by brief or oral argument. Section 273 of the Criminal Code provides that an application for a new trial must be made at the term at which the verdict is rendered, unless the judgment be postponed to another term.

After verdict in this case and before sentence, motion was made and grounds for new trial filed. Pending the motion appellant escaped from prison, and the court overruled the motion and refused to grant time to prepare a bill of exceptions. Subsequently appellant was recaptured, and before sentence was passed the motion for new trial, accompanied with the former as well as new grounds in support thereof, was made. This motion was overruled, the bill of exceptions signed, and the court, doubting its right to grant an appeal, refused it.

Within the meaning of Section 273, there was no judgment until the sentence was passed, and consequently the right to make the motion passed over to that term and continued until the sentence. Within the meanings of Secs. 273 and 282, Criminal Code, and Sec. 337, Civil Code, the trial was not over until the motion for a new trial was overruled and the sentence was passed. This is unlike the case of *Wilson v. Commonwealth*, 10 Bush 526. Where this court refused to proceed because, after an application to a judge of this court for an order granting an appeal, the prisoner escaped and was at large at the time the court was asked to pass upon the rulings of the court below. In this case the accused had been recaptured and was in court when the motion for a new trial was made, and continues in custody.

The principal cause of complaint is that the court admitted incompetent testimony and refused to hear competent evidence offered by the defendant. The first objection is that the court erred in allowing Green Walls to state that a few days before Wickersham's house was burned appellant passed through the field of witness, and that he no-

ticed from the track that there was a patch on one of his shoes, and that the morning after the burning of the house he saw a track like it near Mrs. Lair's house. Mrs. Lair testified that on the night the house occupied by Wickersham was burned, and, about 11 o'clock, several persons came to her house; that she thought from the noise that they made that there were six or seven of them; that she recognized the voice of Tobe Farmer because he stutters. Wickersham had testified that appellant and Tobe Farmer were of the party who burned his house, and that on leaving they went in the direction of Mrs. Lair's. The resemblance of the foot print near Mrs. Lair's to the foot print in the field, considered in connection with the statement of Wickersham that appellant and Farmer were of the party that burned his house, and that they went in the direction of Mrs. Lair's when they left, is undoubtedly a circumstance tending to confirm the statement of Wickersham that appellant was of the party doing the burning, and the evidence was therefore competent.

Appellant also complains that Baker Walls was not permitted to give his opinion as to how long it would require a person to walk from the house of appellant to the house that was burned. The bill of exceptions does not show what response was expected from the witness; and conceding the question competent, this court cannot say that the appellant has been prejudiced by the action of the court in refusing to allow the witness to express his opinion. Counsel should have stated to the court what they hoped to prove by the witness, and that should have appeared in the bill. *Chrystal v. Commonwealth*, 9 Bush 669; *Nichols v. Commonwealth*, 11 Bush 575.

Hooker says he saw several persons in the vicinity of Wickersham's the night of the burning; that he recognized Matt Smith, thought one was Tobe Farmer and the other either appellant or his brother. Objection is made that the recognition in the alternative is not competent. Standing alone this statement would not be substantive evidence that appellant was of the party that burned the house; and to prove that Farmer and Smith, in company with others, were in the party that were seen going to or from the house the night of the burning would not of itself convict appellant of the crime. But Wickersham, whom the defense attempts to impeach, says that he recognized Farmer, Smith and appellant in the party that did the burning, and evidence tending to show that Farmer, Smith and one of the Cains were also in the party is confirmatory of the identity of Smith and Farmer, and increased the probability that Wickersham

was not mistaken as to the identity of appellant. When the offense to be charged is to be made out to a great extent by circumstantial evidence the statement of the witness that the person he saw with Farmer and Smith was either appellant or his brother is some evidence, taken in connection with the other proof that appellant was the person seen by the witness. Considerable latitude must of necessity be allowed in such cases.

No objection appears to have been made to the instructions.

Perceiving no error to the substantial rights of appellant, the judgment is *affirmed*.

J. S. Hocker, for appellant.

H. E. ROUSE *v.* R. H. McFARLAND.

Misconduct of Jury.

Where a few of the members of the jury on their way to the jury room step aside to a water closet for a few minutes, but converse with no one, such act does not constitute misconduct.

Evidence of Misconduct of Jury.

The evidence of a juror will not be heard to impeach his own verdict.

APPEAL FROM HENDERSON COURT OF COMMON PLEAS.

February 5, 1879.

OPINION BY JUDGE ELLIOTT:

Three grounds are relied on here and were relied on in the lower court for reversal, to wit: 1. The verdict is contrary to law; 2. The verdict is contrary to the evidence; 3. Misconduct of the jury.

As to the first two grounds but little need be said. The appellee proved by himself that he was employed by appellant to attend his sick daughter, and as her physician to try to effect her cure. He proved, further, that he did so attend her at appellant's solicitation, and that his charges were reasonable and appellant had promised to pay them, and had made a partial payment thereon.

The misconduct of the jury stated in the grounds for a new trial has not been sustained by the evidence. The only pretended misconduct of the jury was that on their way up to the jury room a few of them retired a few steps to a water closet, but in a few minutes

joined their associates in the jury-room, and that in the meantime they had conversed with no one on the subject.

It was, however, attempted by appellant to prove by the jurors themselves that they had been guilty of misconduct in the jury-room. That the evidence of a juror will not be heard to impeach his own verdict has been decided by this court in *Doran v. Shaw*, 3 T. B. Mon. 416; *Steele's Heirs v. Logan*, 3 A. K. Marsh. 394; *Cain v. Cain*, 1 B. Mon. 213; *Commonwealth v. Skeggs*, 3 Bush 19, and other cases. In *Cain v. Cain*, supra, this court decided that the affidavit of a juror might be used in support of his verdict but not to impeach it.

On the merits of this case the evidence was conflicting, and the jury were fully authorized to find the verdict assailed by this appeal.

Wherefore the judgment is *affirmed*.

H. F. Turner, for appellant. M. Yeoman, for appellee.

SAMUEL FRANKLIN, ET AL., v. G. H. LAWRENCE, ET AL.

Punitive Damages in Trespass.

Where a defendant in a damage suit for unlawfully searching plaintiff's premises for stolen goods, not having a search warrant, does so in a high-handed and lawless manner, the jury are authorized to assess punitive damages.

Proof of Averments of Answer.

When an answer, in a case for unlawful search, sets up that the search was made by an officer and men under his authority, but on the trial there is no attempt to justify under a search warrant and no instruction asked or given on that subject, the plaintiff is entitled to recover.

APPEAL FROM GRAVES CIRCUIT COURT.

February 6, 1879.

OPINION BY JUDGE ELLIOTT:

To action for trespass for the forcible entry of appellants into appellees' residence, and the breaking of chests, searching of bureaus, bedrooms, etc., as they claimed, for stolen goods, they answered claiming that as an officer and men under his authority they had a right to search the house by virtue of a search warrant issued by a justice of the peace.

But on the trial there was no attempt to justify under any search

warrant, and at the close of the evidence the case was given to the jury without instructions being asked or given to the jury.

The entry of the appellees' house, alarming their family, and on an errand which conveyed the imputation that they had on their premises secreted stolen goods, made out or rather aggravated trespass; and as no instructions were asked and there was no error of law committed, we cannot say that the verdict of the jury is so excessive as to indicate passion or prejudice on the part of the jurors.

The conduct of the appellants was unauthorized, high-handed and lawless and in such cases the jury are authorized to assess punitive damages by their verdict; and unless the amount is such as to indicate passion and prejudice on the part of the jury, we are not authorized to disturb it.

Wherefore the judgment is *affirmed*.

L. Anderson, for appellants. Tice & Crossland, for appellees.

HENDERSON NATIONAL BANK v. S. B. MARTIN'S ADM'R.

Usury.

Where a debtor's obligation is evidenced by a promissory note drawing a legal rate of interest, and payments are made from time to time and new notes taken for the balance at such settlements, the debt is the same debt notwithstanding renewals, and the defendant may set up the defense of usury on the note sued on even where the usury exacted was paid on some former note evidencing the debt.

APPEAL FROM HENDERSON COURT OF COMMON PLEAS.

February 6, 1879.

OPINION BY JUDGE ELLIOTT:

S. B. Martin borrowed of Thomas S. Knight the sum of \$1,000, for which he executed his promissory note, which on its face only called for six per cent. interest.

On the 14th day of September, 1870, Martin and Knight had a settlement of the amount due on the note, and as the balance due thereon Martin executed his note to Knight for \$846.35, and to secure the note Martin gave a mortgage on a tract of some 185 acres of land.

In 1873 S. B. Martin sold some 80 acres of this mortgaged land to Hocker and Vanderson for two notes of \$400 each, one due 1st of March, 1875, and the other due 1st of March, 1876, and each

bearing 6 per cent. interest from date. In 1875 S. B. Martin sold these two notes to Knight, who was to give him credit for their amounts on the note for \$846.35, which Martin had executed to him on the 14th day of September, 1870.

Knight assigned the notes on Hocker and Vanderson, and also the note he held on Martin to the appellants. On the 6th day of May, 1875, Martin and Knight made a calculated settlement as to the amount due on the note which Martin had executed to Knight September 14, 1870, and it was then agreed that Martin owed Knight, as of the 1st of March, 1875, \$450 balance on the note. This agreement was endorsed on the note and signed by S. B. Martin.

It is established by the evidence of T. S. Knight himself that he charged Martin 10 per cent. interest on the \$1,000 loaned from the 7th day of August, 1863, up to September 14, 1870, when the note for \$846.35 was executed, and that in the settlement of May 6, 1875, between him and S. B. Martin, the \$450 which Martin endorsed on the note as due from him was ascertained by charging Martin 10 per cent. annually compounded on the note for \$846.35, and allowing credit for the amount of the Hocker and Vanderson notes with 6 per cent. from the time due. After this settlement, the appellant, holding the two notes of Hocker and Vanderson and the original note for \$846.35, executed by S. B. Martin to Knight, as Knight's assignee, brought these two consolidated suits for their collection and to enforce the purchase money lien against Hocker and Vanderson for the notes which they owed, and to enforce Knight's mortgage for the agreed balance which Martin had endorsed on the note to Knight of date, September 14, 1870.

On hearing the court enforced the purchase money lien against Hocker and Vanderson, and also enforced Knight's mortgage lien for \$206.75 of the \$450 which S. B. Martin had endorsed as due on the note to Knight of \$846.35, against that part of the Martin tract of land not sold to Hocker and Vanderson; and as George B. Martin had bought this interest in the land he asked a cross-appeal in the lower court, but has waived it by failing to pray a cross-appeal in this court. See Sec. 755, Civil Code of 1877.

Appellant's principal complaint is that neither Hocker, Vanderson nor George B. Martin can set up the defense of usury with success. It also contended that the note executed by Martin to Knight on the 14th of September, 1870, with a mortgage as its security, was a payment of the \$1,000 loan of 1863; and as to the usury paid on the new

note nobody can object to its payment or reclaim it but S. B. Martin's administrator.

The answer that set up the usurious payment of interest was in the name of the defendants, and Martin's administrator was one of the defendants. We are of opinion that the execution of the note for \$846.35 in 1870 was not a payment of the \$1,000 loan of 1863, but was only evidence of the balance due on that debt; and as the evidence is almost conclusive that 10 per cent. was counted on the debt from 1863 to March 1, 1875, and that that per cent. was compounded from September 14, 1870, it is reasonably clear that purging the \$846.35 note of the usurious interest, or rather allowing a credit for such interest, would leave no balance on that note, although Martin had agreed to a balance of \$450.

The case of *Lee v. Fellowes & Co.*, 10 B. Mon. 117, fully sustains the right of the appellees, Hocker and Vanderson, and George B. Martin, to purge the note of \$846.35 of all usurious interest before attempting to enforce any liens on their land for its payment.

The judgment is therefore more favorable to the appellant than is authorized by the law; but although George B. Martin prayed a cross-appeal in the lower court he failed on his cross-errors to ask a cross-appeal in this court, and consequently we cannot notice the errors of which he complains, and the errors committed are certainly not prejudicial to appellant.

Wherefore the judgment is *affirmed*.

Vance & Merritt, for appellant. M. Yeoman, for appellee.

R. B. GRAVES *v.* JOHN MCKINNEY, ET AL.

Sale of Personal Property.

To vest the legal title to personal property in the vendee, the thing bought must be set apart from other property of a like kind belonging to the vendor, so that the vendee can identify and take possession of his property.

Right of Creditors.

Where the law declares a purchase of personal property void because no delivery of property, such a purchaser can acquire by such purchaser no equity as against the vendor's creditors.

APPEAL FROM CLARK COURT OF COMMON PLEAS.

February 7, 1879.

OPINION BY JUDGE ELLIOTT:

On the 9th of November, 1876, John McKinney purchased of S. C. and C. C. Graves a thousand barrels of corn at \$1.25 per barrel. The corn had been severed from the soil and was in shocks on the field where grown, and it was agreed that against the 1st of January, 1877, some average shocks were to be weighed, and by such average weight enough shocks were to be set apart to McKinney to make his thousand barrels of corn.

Before this had been done the appellant brought suit and sued out an attachment, and had it levied on the corn that McKinney had contracted for, and for which he had executed a negotiable note which he afterwards paid. McKinney, by petition, became a party to appellant's suit and claimed the corn, and on hearing the court adjudged in his favor, and hence this appeal.

We are of opinion that the title to the corn did not pass to McKinney by his contract of the 9th of November, 1876. He did not purchase any designated thousand barrels of corn, but he bought a thousand barrels of corn to be afterward separated from other corn then standing in the shock in the vendor's field, and to be measured or weighed to him in the future.

It is a well-settled rule of law that to vest the legal title to personal property in the vendee the thing purchased must be set apart from other property of the like kind belonging to the vendor, so that the vendee can identify and take possession of his property, and therefore whenever there is anything to be done by the vendor before the vendee can take possession, such as separating the goods from his other goods of like kind, the title does not pass.

Therefore, as the corn which McKinney contracted for was standing in the field with other corn of the vendor's and was afterward to be separated from such corn and delivered to him, no title passed to him till the corn was weighed in the shocks, averaged and set apart to him according to the written contract.

It is, however, said that appellant brought his suit in a court of equity, and as McKinney had contracted for a thousand barrels of the corn which appellant afterward attached, and as McKinney had paid his money for the corn, his claim in a court of equity is superior to that of appellant. We are of a different opinion, for unless the possession of the corn accompanied McKinney's purchase of it, then the sale as to creditors and subsequent purchasers is absolutely void, and we cannot see how the vendee can acquire any equity against a

creditor, when as to such creditor the law declares his purchase a nullity. That is working out an equity by a violation of the law, and equities are never worked out in that way.

The corn for which McKinney had contracted had been severed from the ground and soil and was in the shock on the field of S. C. and C. C. Graves. In this field were twelve or thirteen hundred barrels of corn, and appellee, McKinney, was to have a thousand barrels of this corn, to be afterward weighed and separated from the unsold corn, and therefore until weighing and separation the vendors and vendee could not know what corn belonged to the vendee and what corn remained to the vendors, and if before such weighing and separation McKinney had sued his vendors in claim and delivery for the corn so purchased he could not have recovered, for the reason that no title passes till the corn contracted for had been identified by being separated from the other corn according to the written contract of purchase.

The evidence is ample that S. C. and C. C. Graves had been, and were at the time of the suing out of appellant's attachment, disposing of their property in fraud of the rights of their creditors. At the time of the levy of the appellant's attachment the legal title to the corn was in his debtors, S. C. and C. C. Graves, and as McKinney had acquired neither the legal title nor been put in the actual possession of the corn for which he had contracted, he acquired no title which in law or equity can overreach the lien acquired by the attaching creditor. He did not contract for an equity in the corn, he contracted for the legal title, but as the possession did not accompany his purchase it was void as to appellant, who was an attaching creditor. To sustain these views the following authorities are referred to: *May v. Hoaglan*, 9 Bush 171; *Brown & Long v. Childs & Co.*, 2 Duv. 314; *Crawford v. Smith*, 7 Dana 59; *Newcomb, Buchanan & Co. v. Cabell*, 10 Bush 460.

Wherefore the judgment is *reversed* and cause remanded for further proceedings consistent with this opinion.

Leland & Hathaway, George B. Nelson, for appellant.

Haggard & Jones, for appellees.

HENRY MAY v. JOHN DILLS, JR.

Ground for New Trial.

Where the court refused to permit a defendant to offer evidence to sustain the allegation of his answer respecting the wrongful conversion of the property, and this was not made a ground for a new trial, the court of appeals will not pass on the alleged error.

APPEAL FROM PIKE CIRCUIT COURT.

February 7, 1879.

OPINION BY JUDGE HARGIS:

The action of the court in refusing to allow the appellant to offer evidence to sustain the allegations of his answer respecting the wrongful conversion of the property was not made a ground for a new trial, and we cannot therefore take cognizance of that alleged error.

Four separate grounds for a new trial were stated: 1. That there was error in assessment of amount of the recovery; 2. That the verdict was not sustained by sufficient evidence and was contrary to law; 3. "Errors of law occurring at the trial and excepted to at the time"; 4. The court erred in instructing the jury.

The appellant admitted that he took 80 or 82 hides worth \$4 or \$4.50 per side, and that he took the oxen which the evidence conducted to prove were worth \$120 to \$125. But upon the evidence before them the jury might have fixed the value of the leather much higher than the appellant stated it in his answer, and they were also authorized to allow interest from 1862. We cannot, therefore, say upon such a state of fact that the estimate made by the jury was clearly beyond what the evidence authorized. We perceive no error in the instructions given to the jury, and none is pointed out by counsel.

The third ground may be disposed of in the language of this court in *Craig v. Dennis*, Mss. Op., November, 1875. Although the third "ground for a new trial is in the language of the code, it is insufficient to call in question any of the rulings of the court made during the progress of the trial." It is necessary under this clause of the party complains. If it was intended to rely on the fact that the error so as to notify the circuit court what the error is of which the statute (Sub-sec. 8, Sec. 340, Civil Code) to set forth the particular error in refusing to admit evidence to sustain the counter-

claim, that fact should have been stated in the grounds for a new trial.

This rule has been long adhered to in this court, and is necessary to the dispatch of business and the right administration of justice in the courts. It may sometimes produce hardships, but will generally subserve the ends of justice, and is now too firmly established and has been too often acted upon to be departed from in this case.

This court can only correct errors of the court below when they are so presented by the record as to enable us to consider them without disregarding long established rules of practice.

Wherefore the judgment must be *affirmed*.

Judge Elliott not sitting.

G. N. Brown, for appellant. R. Apperson, for appellee.

J. M. WARNOCK *v.* JOHN C. LORAN, ET AL.

Contracts—Illegal Consideration.

A contract made by a county clerk to furnish copies of naturalization papers to voters, to be paid for by a candidate for office to secure votes is contrary to public policy and void. The influence originating from the execution of such contracts should not be allowed to operate on the elector casting his vote, or the official who by law is designated as one of the instruments to confer upon him the right of suffrage.

APPEAL FROM JEFFERSON COURT OF COMMON PLEAS.

February 12, 1879.

OPINION BY JUDGE PRYOR:

It is not deemed necessary in this case to investigate the question as to the right of the clerk to charge a fee for furnishing to the applicant the evidence of his having been naturalized, and we will only suggest that to exact compensation in advance for the services rendered would, in many instances, make the exercise of the right of suffrage depend on the ability to pay. It appears from the testimony that the claim of the appellee originated by reason of services rendered in giving copies of naturalization papers to various persons, during the contest for the office of mayor in Louisville between Jacobs and Baxter. The friends of Jacobs, as appellees show, learned that Baxter's friends had made an arrangement with him (the clerk) to give copies of such papers on Baxter's credit, and the appellant,

one of the supporters of Jacobs, desired to make a similar arrangement with the appellee in behalf of Jacobs.

The arrangement was concluded with the deputy clerk by which the persons were to be naturalized on the order of the appellant, and such as received the evidences of their right to vote, or citizenship, on such an order, the fees were to be paid by Jacobs or his friends. A copy of one of the many orders constituting the basis of appellee's recovery is as follows :

"LOUISVILLE, KY., December 4, 1875.

ED. KAISER, ESQ. :

Issue papers to bearer.

J. M. WARNOCK."

The appellee, or his deputy, in the execution of this contract made with the appellant, gave what he calls copies of naturalization papers to 232 persons, and copies of a mere declaration of intention to become citizens to as many more. The account for naturalization (complete) is \$464, and for the mere declaration of intention, \$302.50, making in all \$766.50. These copies were not records that had been made prior to the contract between the appellant and the appellee's deputy, but were the evidences of citizenship, and the intention to become citizens, made on the order of the appellant, and for the sole purpose of advancing the interests of one of the candidates at the time canvassing for the office of mayor.

It is further shown that the office of the clerk was so crowded by the applicants asking for the evidences of their right to vote, that a branch office was created at another part of the city, and copies of these records issued with as much facility as if emanating from the principal office. How the clerk or his deputy could exercise this power does not appear ; it is to be inferred that the papers were issued and the records afterward made.

It is insisted by counsel for the appellant that such a contract is contrary to public policy and void, and in this position we fully concur. While the naturalized citizen is entitled to the full enjoyment of his right to vote, and should be protected in its exercise, it is evident that such a contract as is relied on in this case is destructive of the purity of elections, and calculated to induce the elector to vote in a particular way, by reason of the agreement to furnish him at the expense of the candidate, or his friends, the evidence of his right to vote, and the clerk ready by reason of his contract to furnish the necessary papers on the production of a written order from a respon-

sible party, the friend of one of the candidates, that he should be paid for the services rendered.

A deputy clerk was permitted to do much of this work, at an office in the city remote from judge or clerk, and it is manifest that the entry of record was made after the naturalization papers had been delivered. Although the papers issued by the deputy may not be included in the present account, and may have contributed to advance the interest of some other candidate, it evidences the evil tendency of all such contracts, and the necessity of pronouncing them null and void. The influences that must originate from the execution of such contracts, should not be allowed to operate on the elector casting his vote, or the official who by law is designated as one of the instruments to confer upon him the right of suffrage. No promise of fee or reward should be made an inducement for those in power to aid the candidate, where friends are willing to make liberal contributions for that purpose, nor should the influence of wealth or place interfere with the humblest citizen, whether native born or naturalized, in the exercise of this great privilege, "the value of which depends upon the independence, moderation, discretion and purity with which it is exercised."—Kent.

The judgment below is *reversed* and cause remanded with directions to dismiss the petition.

Edwards & Seymour, for appellant.

Laf Joseph, T. L. Bennett, for appellees.

GEORGE C. SCHMIDT *v.* JAMES MILLER'S ADM'R.

Changing Terms of Promissory Note.

A promissory note will be presumed to contain all the evidence of the indebtedness as well as the entire agreement between the parties, and where there is a written agreement to extend the time it must be so stated in the pleadings, otherwise it amounts only to the averment, that the parties agreed by parol at the time of the contract or before.

APPEAL FROM GRANT CIRCUIT COURT.

February 13, 1879.

OPINION BY JUDGE PRYOR:

The case of *Gray v. Briscoe*, 6 Bush 687, is decisive of this case. The defense is seeking to show that the contract was different from

that evidenced by the written promise to pay, and in all such cases either fraud or mistake must be alleged as the basis of the defense. The execution of the writing is admitted, and it is not even alleged that the change the appellant is attempting to make in its stipulations was to have been inserted in the note. The agreement that it should fall due at a future period contradicts in express terms the written promise; and why the parties signed a paper not constituting the real agreement is nowhere pleaded. The note will be presumed to contain all the evidence of the indebtedness as well as the entire agreement between the parties, and if there was a written agreement to extend the time it must be so stated; otherwise, it amounts only to the averment that the parties agreed by parol, at the time of the contract or before, that it should contain stipulations directly conflicting with the writing itself. It is not pretended that there is any usury in the note, and the payments made being only such as the party had the right to demand, the agreement to forbear, if made, was without any consideration.

The demurrer to the answer was properly sustained. Judgment affirmed.

J. M. Collins, for appellant. E. H. Smith, for appellee.

G. W. HOOSER'S ADM'R v. BELLE R. HOOSER.

Proof and Pleadings.

The court cannot grant relief on proof furnished without pleadings filed as a basis for such proof.

Presumption as to Contract.

A written contract is conclusively presumed to contain all the agreement between the parties unless it is specifically alleged and proved that by mistake or fraud the writing does not embrace the contract as entered into between the parties.

APPEAL FROM TODD CIRCUIT COURT.

February 14, 1879.

OPINION BY JUDGE HINES:

There is not a sufficient allegation of fraud in the execution of the note sued on to authorize the introduction of evidence or to raise an issue as to whether the writing contains the contract actually entered into between appellee and G. W. Hooser, deceased. It is not charged

that by reason of the fraud of appellee the writing does not state the facts pertaining to the contract truly. Whatever the inducement to its execution may have been it is conclusively presumed to contain all the agreement between the parties, unless it is specifically alleged and proved that by mistake or fraud the writing does not embrace the contract as entered into between the parties. *Higgins v. Conner*, 3 Dana 1; *Turpin's Adm'rs v. Marksberry*, 3 J. J. Marsh. 622; *Dale v. Pope*, 4 Litt. 166; *Castleman v. Southern Mut. Life Ins. Co.*, 14 Bush 197. Nor does it avail that evidence was heard without objection as to the oral agreement. It has no bearing upon any issue made in the pleadings. The court can no more grant relief on proof without pleadings than on pleadings without proof.

The subsequent parol agreement, if not unenforcible because of the statute of frauds and because of the disability of appellee to contract, she being a feme covert, presents no defense because there is no tender of a conveyance or sufficient offer to comply with the agreement on the part of appellant. The pleadings do not present a case for specific performance. Nor is it necessary in such cases to plead the statute. *Smith v. Fah*, 15 B. Mon. 443; *Hocker v. Gentry*, 3 Met. 463.

The surrender by appellee of the note on Daniel Hooser and his release from liability to her is a sufficient consideration of itself to support the agreement of G. W. Hooser to pay as stipulated in the note sued on.

After a careful examination of the evidence as applicable to the issues raised by the pleadings, and after a full consideration of the questions presented in the briefs of counsel, we are of the opinion that the judgment of the court below is correct, and it is therefore affirmed.

W. L. Reeves, H. Y. Petree, for appellant.

William Lindsay, for appellee.

EDWARD KRUTY v. ELIZABETH KRUTY.

Appeals in Divorce Cases.

No appeal will lie to the court of appeals from a judgment rendering a divorce.

APPEAL FROM GALLATIN CIRCUIT COURT.

February 15, 1879.

OPINION BY JUDGE PRYOR:

There can be no appeal to this court from a judgment rendering a divorce. It is final and not the subject of reversal. The question involved in this case was as to the validity of the marriage, and this being established the divorce followed. Independently of this fact, it appears that these parties lived together as man and wife for many years and raised a family of children, having been married in the state of Illinois, where the doctrine of the common law prevails, or if not, where such marriages are not invalid. That it was a sham marriage to avoid the penal laws of Kentucky, after a recognition of the marital rights for so long a time, will not constitute a defense by the husband. The marriage being established, whether the court below should have granted the divorce is a question this court has no power over, and no examination of the facts have been made with that view. The compromise made with the wife during the pendency of the action should not have been enforced. There is no complaint of the allowance temporarily made, and if there was there is nothing in the record showing it to have been erroneous.

Judgment affirmed.

A. J. James, for appellant. J. J. Landrum, for appellee.

THOMAS S. IRELAND, ET AL., v. SAMUEL B. PUGH.**Abandonment of Homestead.**

One who surrenders his home for sale, removes therefrom, and for two years thereafter is not occupying the premises as a home, must be held to have abandoned the same, and he cannot thereafter assert a homestead claim thereon.

APPEAL FROM LEWIS CIRCUIT COURT.

February 19, 1879.

OPINION BY JUDGE HINES:

The only question discussed by counsel is whether appellee is entitled to a homestead in the property in controversy. Appellee contends that when the property was sold under execution he occupied it, with his family, as a home, and that when he left it he intended to return and make it his home again at some time in the future.

It appears that at the time of sale appellee was moving from the premises, and completed the removal on the day following the sale.

The property was surrendered by appellee for sale in December, 1874, and no claim to a homestead was made until the institution of these proceedings in May, 1876; nor has he been in the occupancy of the premises as a home at any time since the sale. The only evidence of an intention to again occupy the place as a home is found in the statement of appellee, which is as follows: "When he moved away he intended to return and use and occupy said house as a homestead." In view of the fact that appellee is testifying in his own behalf that statement cannot be construed to mean that the intention to return continued without intermission, and that this claim of homestead is now made in furtherance of the then formed and continually existing intention.

The question is not whether he then intended to return, but rather whether the evidence shows an abandonment of his claim to homestead. The abandonment might have been at the time of removal, or it may have since occurred. Such a declaration is not sufficient to outweigh the fact of the surrender for sale. Contemporaneous removal without the assignment of any reason therefor, inconsistent with the presumption of an intention to abandon the homestead by removal, and the protracted residence of appellee elsewhere, especially when the evidence shows no act of appellee or circumstance indicative of the existence and continuance of the intention or inconsistent with the presumption of abandonment by removal.

Wherefore the judgment is *reversed* and cause remanded with directions for further proceedings consistent with this opinion.

E. C. Phiester, for appellants.

W. H. Wadsworth, S. J. Pugh, for appellee.

W. H. WALL *v.* L. W. GATES.

Release of Attachment—Estoppel.

Where property is attached by a landlord for rent, and on its return the tenant executes a bond to perform the judgment of the court and thereby secures the discharge of the attachment and lien on the property seized, he will not thereafter be heard to say there was no affidavit on which to base the attachment.

APPEAL FROM McLEAN CIRCUIT COURT.

February 19, 1879.

OPINION BY JUDGE HINES:

It is immaterial whether the attachment issued in this case is in form such as should have been issued under the general statutes for

the security of rent, or whether it is general in form as prescribed in Myers' Code. The proceeding was to secure the payment of rent out of the property on which appellee had a lien. Bond was executed by appellee, attachment issued and levied on the property to which the landlord's lien attached, and on the return of the attachment appellant executed bond to perform the judgment of the court, and thereby had the attachment discharged and lien of appellee on the property seized released. Appellant will not now be heard to say there was no affidavit on which to base the attachment. The attachment in itself was sufficient to justify the officer in seizing the property, and whatever process would thus protect the officer is sufficient to support the bond. Outside of the question as to the mere form of the bond given by appellee, which might well be said under the decisions to preclude any inquiry in the grounds for attachment, on the broader doctrine of estoppel, appellant should not be heard to complain. By the deliberate act of executing the bond and discharging the attachment he has deprived appellee of a lien that existed upon the property, independent of that acquired by virtue of the issuing and the levying of the attachment.

Wherefore the judgment is *affirmed*.

Johnson & Robinson, for appellant. L. W. Gates, for appellee.

T. C. HART v. TRUSTEES OF PRINCETON COLLEGE.

Debt of Corporation.

Where a corporation owes a debt, and third persons, without any consideration, moving from the debtor or even a request from it, execute their note to the creditor for the debt, it is neither payment, novation, nor accord and satisfaction.

Novation.

There can be no such thing as a novation by agreement to which the debtor is not a party.

Accord and Satisfaction.

There can be neither accord nor satisfaction in a case where the note of a third person is given for another's debt, where the same is not given or accepted, or agreed to be accepted, in discharge or satisfaction of the debt.

Liability of Private School Corporation.

A private corporation engaged in conducting a college like an individual is not exempt from the payment of its debts incurred in the conduct of its school, and there is no public policy which forbids the sale of its property to pay its indebtedness.

APPEAL FROM CALDWELL CIRCUIT COURT.

February 21, 1879.

OPINION BY JUDGE COFER :

The debt sued for was contracted by the trustees of the college for services to be rendered to the corporation. It was the corporation's debt, and the undertaking of Calvert and others was merely as sureties and guarantors. This is evident not only from the language of the writing dated July, 1872, but also from the parol evidence, and there is no foundation in the evidence for the position assumed by the corporation in its pleadings, and in the argument of its counsel, that the appellant was to look to Calvert and his associates for any balance of his salary not paid out of money received for tuition. In the writing they expressly undertake to pay in case it is not collected from the corporation, which is the language of guaranty and not of an original debtor. Moreover, appellant continued after its execution to take the obligations of the corporation as his annual salary fell due, which shows that both parties then understood that it was liable for the whole salary, and the absence of any stipulation that these obligations were only payable out of the tuition fees shows that they did not understand that the corporation was liable only to the extent of that fund.

Nor was the appellant bound to see to it that the fund out of which he was to be paid was applied to that purpose. That stipulation was made for his benefit, and he had a right to waive it without thereby losing his right to look to other resources of his debtor for payment.

It was the duty of the corporation to pay him out of that fund, but it failed to do so, and now that same corporation attempts to set up its own default and disregard of its obligation as a defense, upon the ground that the appellant consented to or acquiesced in the use of the money received for tuition to pay other teachers, and the expenses of the college, and for purposes other than the payment of his salary. In other words, the corporation now says, "I agreed to pay you out of a particular fund; that fund was large enough to pay you in full, but I owed other debts and had expenses to pay, and you consented that I might use the money out of which I had agreed to pay you to meet these debts and expenses, and by such consent you have discharged me from liability to pay you at all." That there has been a change in the board of trustees makes

no difference. It is the same corporation now that it was when the contract with appellant was made, and it cannot set up even the misconduct or fraud of a former board as a defense, unless it could connect the appellant with it in some way, which is not even attempted.

It is not insisted that even if the corporation was originally liable it has been discharged by the execution and acceptance of the note of Calvert and others, of date of July 8, 1874. Prior to its execution Calvert and Turner were only liable as guarantors, and Dawson was not liable at all. The note made them liable as principal debtors, and they might have been sued without joining the corporation. But we are unable to perceive any ground upon which the execution and acceptance of the note can have operated to release the corporation. That the obligors use language which indicates that the note is for their individual debt cannot have that effect in this case on the face of the fact that it was the debt of the corporation for which they were only bound previously as mere guarantors. If the obligors had been sued on the note and had sought to defend on the ground that it was given as a mere guaranty or as collateral security for the debt of the corporation there might possibly be some force in the suggestion that both obligee and obligors had called it the debt of the obligors, and therefore would not be permitted to say it was not. But in a suit against the corporation the utmost effect the statements contained in the note can have is as evidence conducing to prove that the debt was originally the debt of those individuals, and not of the corporation, and that it was not their debt has already been proven.

The corporation was not a party to the execution of the note or of the guaranty previously given. The appellant did not agree that in consideration of either or both of these papers he would release the corporation. Calvert and his associates were mere volunteers. The corporation gave them nothing to assume its debt, nor did it give the appellant any consideration for the illegal acceptance of either, or for its discharge from liability on its original agreement with the appellant. Indeed, it never contracted to be released, or even asked it. The case is simply this: the corporation owed appellant a debt, and third persons, without any consideration moving from the debtor, or even a request from it, execute their note to the creditor for the debt. This was neither payment, novation, nor accord and satisfaction. It was not payment because not so intended or regarded by the parties at the time or afterward, and because

done by mere volunteers without the request or even consent, so far as appears, of the debtor.

There could be no such thing as a novation by agreement to which the debtor was not a party. There was neither accord nor satisfaction, because the note of Calvert, etc., was neither given nor accepted, nor agreed to be accepted, in discharge or satisfaction of the debt. The corporation afterward recognized its liability to the appellant by an entry upon its records; it has never paid the debt, nor contracted with any one to pay for it, and it is not easy to see even plausible grounds for contending that it has been released.

But it is contended that the corporation had no power to create debts beyond its income and surplus resources, and that those having been exhausted the appellant is without remedy. This contention is based upon two ideas: First, that the charter only confers upon the board of trustees power "to keep such number of qualified professors in the several chairs as the means and exigencies of the institution may in their judgment require;" and second, that the college being established to promote education, the public has such an interest in it that the law will not subject it to sale to satisfy the debts of the corporation, whereby it may be destroyed to the prejudice of public education.

In the first place the record does not show that more professors or teachers were employed than the means and exigencies of the institution required. It is nowhere even attempted to be shown either in pleading or by evidence that such was the fact. But if it were, the provision of the charter referred to is directory merely, and not a limitation upon the power of the trustees.

In the second place the corporation is private and not public or quasi-public. It owes no duties to the public which it can be compelled to perform, or for the nonperformance of which it or its managing officers can be punished. It is no more a quasi-public corporation than a manufacturing or mining corporation in whose operations the public are interested because they add to public convenience, comfort and prosperity. Princeton College, like an incorporated manufacturing or mining company, has its stockholders who, if it prospers, will be entitled to receive the profits in dividends, and like such corporations is bound to pay its debts, and cannot hold its property while they remain unsatisfied.

Counsel cites the case of *Winchester & Lexington Turnpike Road Co. v. Vimont*, 5 B. Mon. 1, in support of the position that the prop-

erty of the college corporation cannot be sold. This case rests upon the grounds, First, that the corporate rights, powers and privileges of the company were conferred not alone nor mainly in view of private and individual, but of public interest and convenience, and with the view that the road should be kept open and in repair for the convenience of public travel thereon, and it might well have been added that as it was the duty of the government to establish and maintain public highways, and the government had created the turnpike company, its agent to perform, *pro hac vice*, that duty, it could not consistently permit its own agency to be interfered with in the discharge of the functions and duties of government; second, that the company had no such estate or interest in the thing ordered to be sold as would vest in the purchaser any right whatever, and therefore a sale without benefiting the purchaser, and consequently without benefiting the creditor, would not only deprive the public of the use of the road, but would destroy the property of the stockholders.

The company had but an easement in its roadway, and the moment it ceased to hold that easement for the purpose for which it was granted, the easement would be gone. It would not pass to the purchaser, but would revert to the owners of the fee in the soil over which the road passed.

Not so in this case, however. The corporation styled "Trustees of Princeton College" owes no duty to the public which it can be compelled to discharge. It may maintain a school or not as its managers may decide. But whether it supports a school or not its title to its property and franchises is unaffected. It does not, like the turnpike company, hold a mere easement in property which will be forfeited by non-user, but it owns the fee without limitation or restriction either upon its tenure or power of alienation. A purchaser who acquires its title, will have a complete title, and may use the property as though it had never belonged to a corporation.

There is no public policy which forbids the sale of property so held. The interests of education do not, in our opinion, demand any such rule. Education, as well as common justice, will be best served by requiring educational as well as other institutions to pay their debts when they have property, which in the hands of individuals would be subject to seizure for debt. Incorporated institutions of the kind have no right to such an advantage, if it be an advantage, over individual enterprise; and there is, as we conceive, no more reason

in law, in morals, or in public policy, for exempting from debt the property of an incorporated company devoted to educational purposes than there is for a like exemption of the property of individuals used in the same way. The legislature has not deemed it right to declare that either shall be exempted, and no authority for exempting either has been cited. The debt sued for was created in conducting the college, and if the property of the corporation cannot be subjected to this debt, then it cannot be subjected for any, and we have the novel spectacle of a debtor holding the absolute title to thousands of dollars worth of unencumbered property and yet beyond the reach of its creditors. There is no precedent requiring us to sanction such a doctrine, and we cannot consent to make one.

There is no evidence showing that the debt was created in bad faith on the part of either the trustees or of the appellant, or that the funds of the corporation have been wasted or misapplied; and if they have been that is no answer to a creditor who did not participate in such waste or misappropriation. But we do not perceive any ground upon which the appellant can invoke the aid of the chancellor. He is entitled to a judgment in personam against the corporation for his debt, which may be enforced by an ordinary *fi. fa.*

Judgment *reversed* and cause remanded for a judgment in conformity to this opinion.

T. C. Dabney, J. R. Hewlett, for appellant.

C. T. Allen, P. H. Darby, for appellee.

CITY OF HENDERSON v. INDEPENDENT ORDER OF ODD FELLOWS.

Exemption from Taxation.

The public benefits from the organization of a lodge known as Independent Order of Odd Fellows is deemed consideration for exempting its property from taxation, and the lodge's building is exempt from taxation even though a part of it is rented out to enable the lodge to discharge its indebtedness incurred in erecting the building.

APPEAL FROM HENDERSON COURT OF COMMON PLEAS.

February 27, 1879.

OPINION BY JUDGE PRYOR:

We are not prepared to say that it was an abuse of legislative discretion to exempt the property of the appellee from the payment of all taxes. Public improvements as well as charitable institutions

are often released from the payment of taxes, by reason of the benefits accruing to the public, and to enable those controlling them to continue their use, that the public benefits may be enjoyed. The appellee is a charitable institution organized for the purpose of protecting its members and sustaining the widows and children of such members as may die.

While the dispensation of their charity is confined to particular persons in some manner connected with its organization, and may be withheld at the pleasure of the order, still the public benefits derived from the organization were deemed ample consideration for the exemption. That a portion of the building is rented or not used for the purposes of the order is no reason why the exemption should not be made. The purpose of the renting is to enable the parties to discharge the indebtedness of the order created in the construction of the building, and if not, this court will not inquire into the propriety of such legislation. All such exemptions are made upon grounds of public policy, and the legislature must change the law, and not the court, when deemed expedient to do so.

Judgment *affirmed*.

M. Yoeman, for appellant. J. F. Clay, for appellee.

GEORGE ELLIOTT ROE v. JOHN SEATON, ET AL.

Adverse Possession of Real Estate.

A merely constructive possession of real estate under a grant cannot interfere with a senior patent where the party is in possession claiming to the extent of that boundary.

APPEAL FROM GREENUP CIRCUIT COURT.

February 27, 1879.

OPINION BY JUDGE PRYOR:

The question of difficulty in this case arises by reason of the Logwood patent, several years senior in date to that of the Herndon patent. There is proof conducing to show that the land in controversy is within the Herndon boundary, but at the same time it appears by the testimony of the appellee, John Seaton, that the land is within the Logwood patent, and possession is shown under that patent as well as the Herndon patent. The possession under the Herndon grant is merely constructive, and although claiming to the

extent of the boundary, the claim cannot interfere with a senior patent where the party is in possession claiming to the extent of that boundary. The survey for Logwood is made, as the patent shows, long prior to that made for Herndon, and in examining Logwood's patent counsel will find that it calls for Hardin's lines and not Herndon; and while the calls are similar, the survey by which Logwood's claim is bounded must have been made for some other person than Herndon.

Judgment is *reversed* and cause remanded for further proceedings.

T. H. Paynter, George E. Roe, for appellant.

B. F. Bennett, for appellees.

M. H. THRELKELD, ET AL., v. B. F. DAVIS.

Judgment Not Reversed on Evidence.

In an action at law on a note where no equitable defense is pleaded, parties are entitled to a trial by jury, and where such a suit is transferred to equity on appellant's motion over the appellee's objection and exception, the judgment of the court must be considered as standing in the place of the verdict of a properly instructed jury, and will not be disturbed unless flagrantly against the weight of the evidence.

APPEAL FROM LIVINGSTON CIRCUIT COURT.

February 27, 1879.

OPINION BY JUDGE ELLIOTT:

On the 13th of November, 1871, L. Fleming executed his note to appellee, B. F. Davis, due one year from date, with interest at 10 per cent. from date, for \$1,000, with the appellants and Barnett as his security.

On the 23d day of January, 1875, Fleming and appellee had a settlement, in which appellee charged Fleming with interest at the rate of 10 per cent. on the loan of \$1,000, and deducting what he had paid thereon, took his note for \$264.25, which settled the interest on the note for \$1,000 up to the 13th of November, 1874, making \$300 which was credited on the note. In the fall of 1875 appellee and Fleming settled the interest for that year at \$100, and Fleming executed his note for that sum, which was credited on the note for \$1,000.

In January, 1877, appellee brought this suit against Fleming, Barnett and the appellants for the recovery of the balance due on the

note for \$1,000. The appellants and Barnett, by answer, relied on a contract between appellee and Fleming made after the maturity of the note by which appellee agreed to extend the time of the payment of the note of \$1,000 on which they were security, in consideration of the payment by Fleming of 10 per cent. interest per annum.

These securities alleged that on the 23d day of January, 1875, Fleming agreed to pay 10 per cent. from the execution of the note up to that time, and 10 per cent. on for another year, provided appellee would extend the time of payment one year from that time, and that the proposition was accepted and part of the agreed interest paid, and Fleming's note for \$264.25 executed for the balance.

All the evidence agrees that appellee charged Fleming 10 per cent. on the note on which appellants were security, and that the note for \$264.25 was taken for the balance of such interest; and there is no dispute as to the fact that appellee charged Fleming \$100 interest on the note in dispute for the year 1875, that he took his note for such interest, and that all these sums were credited on the \$1,000 note.

But there is an irreconcilable conflict between appellee and Fleming on the question of a contract between the parties for an extension of the time of payment of the note in dispute. Appellee is positive that he only took Fleming's note for the accrued interest at 10 per cent. after it fell due, and credited same on the note, but that no contract was made with Fleming for any extension of time. On the other hand Fleming swears that at the time of the execution of the note for \$264.25 appellee agreed in consideration of that note and eighty-odd dollars which he had paid him to extend the time for the payment of the note for \$1,000 for one year from that date. This is all the evidence offered as to a contract between appellee and Fleming for an extension of time.

It was also alleged that after the institution of this suit appellee and the surety, Barnett, made a compromise as to Barnett's liability, which was fixed at one-third of the note sued on, and that Barnett withdrew his answer. These allegations are denied by appellee, and disproved by him and Barnett and other evidence. Appellee proves that such a compromise was talked of, but abandoned when his lawyer opposed it, and in this he is corroborated by his attorney as well as Barnett's, and by Barnett himself.

It is also alleged that the appellant, Threlkeld, gave appellee notice to sue or collect his debt from Fleming, and that he was induced

to countermand such notice and agree to stand bound on Fleming's note for another year by the misrepresentations of appellee made to him as to Fleming's financial condition. These allegations are denied and disproved by appellee, and Fleming proves that Threlkeld agreed to stand bound for him on the note to Davis for another year at his and not at Davis' solicitation.

This suit was an action at law brought on a promissory note, and there was no equitable defense set up to it. All the issues were legal ones, and on them both parties were entitled to a trial by jury. The suit was transferred to equity on the appellant's motion and over appellee's objection and exception, and therefore the judgment of the court must be considered as standing in the place of the verdict of a properly instructed jury, and cannot be disturbed unless flagrantly against the weight of the evidence.

Tried by these rules we think the judgment is supported by the evidence. As to the alleged error committed by the appellee in giving his own deposition the second time, and also taking Barnett's deposition the second time, we are of opinion that the new matter sworn to by these witnesses was not prejudicial to appellants on the issues made, even if they could not have given their second depositions without an order of court, and if appellants have properly raised that question by merely objecting to the reading of instead of excepting to the depositions.

Wherefore the judgment is *affirmed*.

W. D. Greer, for appellants.

Bush & Hendricks, Handlin & Webb, S. H. Pates, for appellee.

W. C. GRAVES, ET AL., v. W. F. PREWITT.

Rent of Premises Sold.

A voluntary alienation of real estate entitles the alienee to the rents falling due after the alienation, and where a sale is made under a judgment it is a sale in which the court acts for and at the instance of the owners, and is the same as if made by the owners in person, and the purchaser at such a sale is entitled to the rents falling due after such sale.

APPEAL FROM CLARK COURT OF COMMON PLEAS.

February 27, 1879.

OPINION BY JUDGE COFER:

On the 5th day of March, 1877, a portion of the heirs and devisees of Virginia Graves, deceased, leased a tract of land to H. B. and W. B. Nelson, for a term to end March 1, 1878, for the sum of \$1,100, which they contracted to pay January 1, 1878.

April 24, 1877, the land was adjudged to be sold for the benefit of the heirs and devisees of Mrs. Graves. July 6, following, a sale was made and the appellee became the purchaser of the land at the price of \$7,962.52, payable, according to the terms of the decree, in six, twelve, and eighteen months, with interest at the rate of 8 per cent. from the day of sale. At the ensuing September term the master's report of the sale was filed and confirmed. The judgment did not mention the time when the purchaser would be entitled to possession, but at the time of confirming the sale the court awarded to the purchaser a writ of possession to issue forthwith, for the house and yard, and for the remainder to issue March 1, 1878, and also ordered that he should have the right of ingress and egress to and from any part of said premises for purposes of fall plowing and seeding.

January 8, 1878, the appellants brought this action at law against Nelsons to recover the rent due from them. The petition contained two paragraphs. The first sought a recovery on the covenant executed by Nelsons to pay the rent "to such persons as may be entitled to the rents and profits of said land," and the second paragraph sought a recovery for use and occupation.

Nelsons demurred to the petition, but their demurrer was overruled; they then filed an affidavit and admitted an indebtedness of \$1,000 for rent, and alleged their readiness to pay it, but averred that the present appellants, the heirs and devisees of Mrs. Graves, were claiming it, and sought to compel the appellee to interplead with them. The court overruled that motion, and thereupon the appellants presented their petition to be made parties, and were permitted to come in; and on hearing the court adjudged that the appellee was entitled to the rent and rendered judgment in his favor against Nelsons, and the appellants prosecute this appeal to reverse that judgment.

They complain that the court erred in not adjudging that the appellee had no right to sue on the covenant executed to them, and that he was not compelled to elect whether he would prosecute the first or second paragraph of his petition. Nelsons do not appeal, and the appellants were not prejudiced by these rulings, and it is unnecessary

to inquire into their correctness. It does not matter to them what judgment has been rendered against Nelson. All they are interested in knowing is whether the court erred in deciding that they were not entitled to the rent.

Whatever may be the correct rule in respect to a purchaser under a coerced sale, the case of *Epperson v. Blakemore*, 2 Bush 241, has decided that a voluntary alienation entitles the alienee to the rents falling due after alienation. In this case, although the sale was made under a judgment, it was a sale in which the court acted for and at the instance of the owners, and should be treated as if they had made the sale directly and in person. The mere form of the sale rendered necessary by the disability of two of the joint owners did not change its real character.

Judgment *affirmed*.

R. A. Thornton, W. W. Beckner, for appellants.

Haggard & Jones, for appellee.

JOHN GRAY *v.* H. C. SHEETS.

Approval of Attachment Bond.

To recover on an attachment bond it is not required that the bond should show on its face that it was approved. The taking of an attachment bond amounts to an approval by the officer, and the parties are bound by it.

APPEAL FROM KENTON CIRCUIT COURT.

March 1, 1879.

OPINION BY JUDGE COFER:

It is alleged in substance that the appellee instituted suit against Graham in the Kenton Chancery Court and sued out an attachment and caused the trustees of the Southern Railway to be summoned as garnishees, that Graham and Gray executed the bond sued on to procure a discharge of the attachment, and that the appellee recovered judgment in the action against Graham, which is unpaid.

All these allegations being taken to be true on demurrer, the petition is clearly sufficient, unless it is necessary to the validity of the bond that it should appear on its face to have been "approved" by the officer. The obligors in the bond undertook and bound themselves to the appellee that Graham should satisfy the judgment ren-

dered in the action, and the bond, as confessed by the demurrer, having been taken in the action in which the judgment was rendered for which they are sought to be held liable, the taking of the bond amounted to an approval by the officer, and the appellants are bound upon it.

That the appellee had already a judgment against Graham for his debt is no reason why he should not recover against him on the bond. The bond binds him and another to satisfy the judgment, and not having done so a cause of action accrued to him for the breach of the bond, and by suing and obtaining judgment on the bond the first judgment is merged in or satisfied by the second.

Counting interest on the amount of the bond from April 9, 1877, to January 19, 1878, when the judgment in this case was rendered, the amount for which the appellee was entitled to judgment was \$524.16; and as Gray is only liable for the amount he undertook to pay, the judgment must for that alone be reversed.

Judgment *reversed* and cause remanded for a judgment in conformity to this opinion.

T. F. Hallam, for appellant. Stevenson & O'Hara, for appellee.

CHARLES WILLIAMS v. COMMONWEALTH.

Criminal Law—Circumstantial Evidence.

Where in a trial for burglary circumstantial evidence alone is relied upon by the prosecution, it is not enough to show that the accused stated when arrested that the goods charged to be stolen could be found at a designated place, his knowledge concerning the location of the goods forms but one link in the chain, and before the accused could be convicted it was necessary to connect this fact with the house alleged to have been broken, and that, too, at the time when the breaking occurred.

Felony.

The term felony used in the definition of the crime of burglary embraces any crime which was a felony at common law, whether it is now punished as a felony or not, and it was not error for the court to charge the jury that breaking into a dwelling in the night time with intent to steal any property of another therefrom was burglary.

APPEAL FROM FAYETTE CIRCUIT COURT.

March 1, 1879.

OPINION BY JUDGE COFER:

The principal ground for evidence of confessions made to an officer, or other person having the prisoner in custody, is that he may have been influenced by hope or fear to untruly inculcate himself. When the statement made by the prisoner indicates his knowledge of a fact in some way connected with the crime charged against him, and it turns out upon investigation that the fact exists as he stated it, and his knowledge of the fact conduces to prove his guilt, we see no reason for rejecting so much of his statement as is thus verified.

The appellant, while in Cincinnati, stated where the jewelry alleged to have been stolen from the prosecutor's house could be found in a stone wall in Lexington, and on search being made at the place the jewelry was found. His statement was thus verified, and there was no longer any reason for excluding it, because there was no longer any reasonable ground to apprehend that he might have been influenced by hope or fear to make a false accusation against himself. His knowledge of the place where the jewelry was concealed was evidence conducing in some degree to prove his guilt.

But the answer of the prosecuting witness to the question asked by appellant respecting the set in the ear-ring was not responsive to his question, and was incompetent in itself, and we incline to think it should have been excluded. This, however, in view of other evidence tending to show such knowledge of the jewelry on the part of the appellant as would have authorized the jury to find that he had had it in his possession, would not, perhaps, have been sufficient ground upon which to reverse the judgment.

But the court erred in not giving the peremptory instruction asked by appellant's counsel. If it be conceded, though even that is doubtful, that there was some evidence conducing to prove that Reid's house was broken into in the night time, there was no evidence whatever to connect the appellant with the crime. That the jury might have inferred from his knowledge of the place where the jewelry was concealed that he concealed it there, and thus have traced the possession of it to him, was not enough.

The jewelry is, as it were, a link in the middle of the chain, and after connecting the appellant with it, it was necessary to connect it with the house alleged to have been broken and that, too, at the time when the breaking occurred. This was not done.

True, Reid stated that the jewelry found at the place where appel-

lant said it was concealed, was stolen from his house, but his cross-examination showed that he did not know or pretend to know that such was the fact. He does not even say that it was in his house when he left home, much less that it was there on the night of the burglary and was missing on the next morning. He says his family was at home when he arrived on the morning of the 14th of July, and it would have been easy to make the necessary proofs if the fact existed.

As the evidence on another trial may be sufficient to warrant the submission of the case to the jury, it is proper we should pass on the objections taken in the ruling of the court in giving and refusing instructions. The substance of appellant's third instruction is embraced in his second which was given, and in the instruction given by the court of its own motion.

The court's instruction is not obnoxious to the objection argued by counsel. The term "felony" used in the definition of the crime of burglary embraces any crime which was a felony at common law, whether it is now punished as a felony or not. The division of larceny into two classes, one of which is punished as a felony and the other as a misdemeanor, is statutory. At the common law all larcenies were felonies, and there was no error in telling the jury that breaking into a dwelling in the night time "with intent to steal any property of another therefrom" was burglary. Nor was there error in indicating larceny as the ulterior crime.

There was no evidence of any intent to commit any other crime, and the instruction was proper. Judgment *reversed* and cause remanded for a new trial upon principles not inconsistent with this opinion.

J. Soule Smith, for appellant. Moss, for appellee.

WILLIAM A. HARVEY v. A. J. JAMES, ET AL.

Rescission of Contract for Fraud.

Where the vendor of mortgaged real estate has reason to believe, notwithstanding the mortgage is recorded, that the vendee is making the purchase believing the title clear of encumbrance, and would not purchase it if he knew of the existence of the mortgage debt, the silence of the vendor is a fraud upon the vendee, and rescission of the contract of purchase should be decreed.

APPEAL FROM BARREN CIRCUIT COURT.

March 1, 1879.

OPINION BY JUDGE HINES:

The complaint here is of that portion of the judgment below rescinding the sale made by appellant to appellee. The mortgage lien of Cummings on the mill property sold by appellant to appellee was clearly unknown to appellees at the time of their purchase. The inquiry is whether it was the duty of appellant, under the circumstances, to make known the existence of the mortgage, notwithstanding it was of record?

If appellant had reason to believe that appellees were making the purchase of the mill property, believing the title clear of encumbrance, and they would not have purchased if they had known of the existence of the mortgage debt, his silence was a fraud upon appellees for which a rescission should have been decreed. It is manifest from the price to be paid by appellees, from the terms of payment, and the amount of the mortgage debt that appellees were in ignorance of Cummings' claim, and that if they had had knowledge of it they would not have purchased without making some disposition of it. We also think that the evidence is almost conclusive that appellant knew that by his silence in regard to the mortgage debt he was misleading appellees to their prejudice. *Peebles v. Stephens*, 3 Bibb 324; *Kennedy v. Johnson*, 2 Bibb 12.

The evidence strongly tends to show that appellant knew that the name of one of the sureties to the bond given by appellee had been signed twice. One of the appellees testifies that he called appellant's attention to the fact when the bond was delivered, and offered to tear off the last name, but that appellant said it made no difference. It does not sufficiently appear that appellant was misled by appellees as to the solvency of the sureties on the bond, or that his relation to the property or to appellees was in any way changed by reason of any fraud or misconduct of appellees. Appellees were under no obligation to accept Cummings as their debtor instead of appellant, except upon such terms as they might demand; and the evidence is that they proposed to continue payments to Cummings on condition that he would first release his mortgage, which he refused to do.

Appellees are not estopped by consenting to the assignment of their bond to Cummings to raise the question of fraud in the sale. The weight of evidence is that they consented upon the condition that Cummings would release his mortgage and be substituted to all the contract rights of appellant, and not that they agreed to a new contract with different terms and more stringent liability.

Taking everything into consideration, it appears that the chancellor, in his decree rescinding the sale and directing the master to take account of rents and payments with a view of adjusting the accounts between the parties hereto, has pursued the course most likely to reach substantial justice in the matter. His opportunity for knowing the parties and their relation to each other being so far superior to ours entitles his opinion on the evidence to the greater consideration.

Judgment *affirmed*.

J. H. Rousseau, T. T. Doty, for appellant.

Leslie & Botts, for appellees.

JOHN HANNING v. ANNA L. HANNING.

Divorce and Alimony.

Where the husband had purchased real estate from his father and taken possession and paid for it, upon a divorce being decreed to the wife the court may attach the land, although the title is still in the father, and decree a lien in favor of the wife for the amount of alimony and allowance granted to her.

APPEAL FROM DAVIESS CIRCUIT COURT.

March 4, 1879.

OPINION BY JUDGE ELLIOTT:

Appellee was married to James Hanning on the 28th day of July, 1873, at Rockport, Indiana, and filed this bill on the first of July, 1875, by which she asked to be divorced from her said husband, and for alimony. On the 15th of December, 1874, she became the mother of a daughter named Mary Emma Hanning, and she asked that proper provision be made for her and her child out of the estate of her husband. By amended pleadings she brought John Hanning, the father of her husband, before the court, and alleged that several years before their marriage her husband had purchased and paid his father, the appellee, for a tract of 150 acres of land lying in Daviess county and worth \$6,000. And by another pleading appellee alleged that her husband had gone to the state of Texas, and that before he left, and to fraudulently defeat her recovery of alimony, he had entered into a combination with appellant by which he was to disclaim the ownership of the 150 acres of land, but was to claim that it belonged to appellant, and in pursuance of this fraudulent

combination the appellant and her husband both claimed that the land belonged to appellant.

She, however, stated that her husband had bought the land and paid for it, and had been placed in possession of it, and both he and his father claimed that it belonged to him. She asked for a writ and obtained an attachment, and made appellant a defendant, and had him garnisheed in the action.

The evidence tends to the conclusion that James Hanning, the husband of appellee, purchased the land in dispute of his father and paid him for it, and on his marriage his father placed him in possession thereof, but had never made him a deed or executed a writing evidencing the contract of sale. We think the verbal sale and payment of the purchase money has been fully established. The cause of divorce is that her husband had for more than six months before their separation habitually behaved toward her in such cruel and inhuman manner as to indicate on his part a settled aversion to her, and to destroy permanently her peace and happiness, and that his temper was so fierce and ungovernable as to endanger her life.

These charges she has sustained in their broadest meaning and their fullest extent. He even forced the appellee out of the door of his house on a cold day while she was still feeble and sick from the birth of her child, and kept her out in the weather for some time. In fact this record shows James Hanning to be a monster of hate, cruelty and revenge, inflicted and wreaked, too, upon his own wife at a time when it was too probable that his ferocious cruelty would result in her death and that of his own offspring.

The contrast between appellee and her husband is great. She proves to be a modest, refined, elegant and cultivated woman, and appears all through this record without a single stain to blot or blot her splendid character for the possession of all the virtues that beautify and adorn a female.

The court adjudged that the appellee is entitled to a divorce, and adjudged in her favor \$2,000 as alimony, and to enable her to rear and educate her daughter, of whom it also gave her the custody. It was further adjudged that the appellee's husband had purchased and paid for the farm of 150 acres of land on which she and he resided at the time of the separation, and although such purchase was by parol, that as he had paid over \$2,000 for it the appellee was substituted to her husband's lien to the extent of the \$2,000 and the

cost of the litigation, and we think that judgment is right and should not be disturbed.

The vendor and vendee are both before the court, and the vendor who has sold a tract of land worth at least \$5,000, and received the purchase price, refused to execute the contract, because in parol. He is garnisheed by the vendee's creditor, and the property is attached. The vendee, on the rescission of the contract to which the vendor is entitled, would have a lien and could enforce it on the land for all he had paid him and for the enhanced value of the land by means of lasting improvements. Why cannot the vendee's creditor be substituted to his rights and his lien, when he has left the state, and is fraudulently combining with his vendor to cheat, hinder and delay his creditor?

We think that appellee had a right to subject the land to the payment of her judgment debt, as according to the proof it does not amount to half the sum to which James Hanning would be entitled on the rescission of the contract with appellant.

Wherefore the judgment is *affirmed*.

W. N. Sweeney, for appellant. Williams & Brown, for appellee.

FIRST NATIONAL BANK OF FRANKLIN v. FORD & BROS.

Relief from Contract on Account of Mistake of Law.

In some cases a party may be relieved against a contract entered into by mistake of law. Where he agrees without consideration to remain bound upon a contract from which in law he has been released and the agreement is made in ignorance of his legal rights, the court may refuse to enforce the agreement and treat it as a nullity.

Mistake of Law.

A mistake of law will not relieve against a contract founded upon a valuable consideration.

Fraudulent Representation.

Before one can have relief because of a fraudulent representation it must be shown that he was misled to his prejudice, and also that the misrepresentation superinduced the agreement.

APPEAL FROM SIMPSON CIRCUIT COURT.

March 5, 1879.

OPINION BY JUDGE HINES:

We are probably at fault in not elaborating our reasons for the conclusion reached in this case at the time the opinion was delivered. On that account and out of deference to the views of counsel for the appellees we deem it proper to make this response to the able and earnest petition for a rehearing.

Counsel say that the reliance of appellant must be upon the paper executed in December, 1874, because the negligence of the appellant in the prosecution of the case prior to that time and after the execution of the paper "A" in February, 1873, was so great as to release appellees from liability. This conclusion, we think, is clearly correct. If for any reason appellees are not bound by paper "B" executed in December, 1874, appellant cannot recover.

But counsel say that appellees executed the last named paper in ignorance of their rights under the law; that it was obtained by fraud and is without consideration. It is not seriously insisted by counsel for the appellees that their clients were ignorant of all the facts connected with the conduct of the case prior to the execution of the paper of December, 1874. But upon the other hand the record shows that there was no concealment of facts, no attempt at concealment, and that appellees were perfectly familiar with all the steps that had been taken. The mistake complained of is simply ignorance of the law.

We do not dispute that there are cases where a party may be relieved against a contract entered into by mistake of law. If he, without consideration, agreed to remain bound upon a contract from which in law he had been released, and this agreement is made in ignorance of his legal rights, the court may refuse to enforce the agreement and treat it as a nullity. But that is not the case under consideration. Here the appellees, having been released by the previous negligence, promised for a valuable consideration to remain bound. The consideration was the detriment to appellant in releasing his rights under the first sale of the property, by which he was entitled to near \$200 of the proceeds. A mistake of law will not relieve against a contract founded upon a valuable consideration.

But they say that it is not binding because entered into by them through the fraudulent representation of the agent of appellant that he would make the property bring more at the second sale than it brought at the first. As we have already seen appellees were not prejudiced by this representation, if in fact relied upon by them.

According to the views of counsel for appellees they had no interest whatever in the matter. It was immaterial to them whether the sale stood or was set aside. Before they can have relief because of a fraudulent representation it must appear that they were misled to their prejudice, and also that the misrepresentation superinduced the agreement. Neither of these things sufficiently appear from the record. The court will not lightly infer fraud in order to give relief upon a contract founded upon a moral consideration alone, much less when based also upon a legal consideration. Chitty on Contracts, pages 1036, 1042, and 1044, Strong's Equity, Sec. 203.

It is true there is an assumption upon the part of appellees, but that assumption is based upon a sufficient consideration and made with a full knowledge of all facts.

Petition overruled.

Bush & Goodnight, A. Duvall, for appellant.

G. W. Whitesides, for appellees.

WILLIAM WOHMAN v. VENABLE & WAGNER.

Law of Place (Lex Loci).

The delivery of a note at the place of residence in Indiana of the payee is an execution of the contract in Indiana, and nothing else appearing, the rights of the parties under the contract must be determined by the law of Indiana.

APPEAL FROM HENDERSON COURT OF COMMON PLEAS.

March 6, 1879.

OPINION BY JUDGE HINES:

The delivery of the note to appellees at their place of residence in Indiana was an execution of the contract at that place, and nothing else appearing, the rights of the parties under the contract must be determined by the law of Indiana. The fact that the note is dated at a place in Kentucky is not a controlling circumstance in determining the place of the making of the contract, or the place of its performance. Wharton on Conflict of Laws, Sec. 411; 1 Parsons on Notes and Bills, 48. Besides, the answer does not attempt to set up a contract different from that stated in the petition, nor is there any proof of the residence of the appellant. The presumption from the pleadings and evidence is that both plaintiffs and defendant resided

in Indiana at the time of the execution of the note, and that the contract was entered into with a view to its construction and application by the laws of the state of Indiana.

Appellant having answered, and tendered only an issue of payment, the judgment cures any new formed defect in the petition as to the law of Indiana in regard to interest allowed then to be charged. But beyond this we are inclined to the opinion that the allegations of the petition as to the law of Indiana is sufficiently specific to tender an issue.

In *Gray v. Briscoe*, 6 Bush 687, we have held that, in a case like this, the court should allow interest from date until paid. Upon the question as to the intention of the parties as to the plan of the performance of the contract, it is proper to say that the law and facts having been submitted to the court, its judgment will be treated as the finding of a jury, properly instructed, which should not be disturbed unless flagrantly against the weight of the evidence.

Judgment *affirmed*.

John L. Dorsey, M. Yeoman, for appellant.

E. H. BOONE, TRUSTEE, ET AL., *v.* MICHAEL GLEASON, ET AL.

Street Improvement Ordinance.

The word "street" used in an ordinance signifies a public thoroughfare in a city or town, and the averment that an ordinance has been passed for the improvement of a named street is sufficient, without adding that it is a public street.

Proof by Record.

The passing of a street improvement ordinance, the making and approval of the contract, completion of the work, inspection by the engineer, the acceptance of the work and the making of the apportionment of the costs of the improvement are all to be proven by the record, and in the absence of an allegation of fraud or collusion the record is conclusive on all these points.

Answer.

In an answer to a petition to collect an improvement assessment the defendant must point out in what particular the assessment is unequal, illegal, erroneous or void, and not simply aver such facts as a conclusion.

APPEAL FROM LOUISVILLE CHANCERY COURT.

March 8, 1879.

OPINION BY JUDGE COFER:

The errors assigned will be disposed of in their order.

The word "street" signifies a public thoroughfare in a city or town, and the allegation that an ordinance had been passed for the improvement of a portion of Seventeenth street was sufficient, without adding that it was a public street.

It is doubtful whether there was a sufficient allegation that the ordinance had been published as required by the charter, but that defect, if it existed, was cured by a denial in the answer that such publication had been made; and although the answer was not filed until after the demurrer was overruled, the technical error does not prejudice the substantial rights of the appellants, as they themselves afterward cured the defect.

The court, in its opinion, indicated that the exception to McGonazales' deposition was not well taken, and for the reasons thus given we concur in that conclusion; but the court did not, by any order in the record, overrule the exception, and as we can only revise the orders and judgments rendered by the court, and cannot revise its opinions not carried into a judgment or order, we could not reverse the judgment on the ground even if we were of the opinion that the deposition should have been excluded.

The court made no order overruling appellant's exceptions to exhibit "A," and for the reasons just given we need not discuss the question whether it was admissible in evidence, and more especially so as the judgment must be reversed upon another ground, which will leave the question open in this case to be governed by the principles announced in *Barret v. Godshaw*, 12 Bush 592.

Several questions are made in argument which fall under the fourth assignment. The evidence sufficiently shows that the ground where the improvement was made was a street. It is laid down upon a plat found upon the records in the clerk's office of the county court, which is sufficiently identified as a copy of Rowan's enlargement, and is, no doubt, the map referred to by him in the deeds filed with McGonazales' deposition. This was a sufficient dedication, and the ordinance and contract to improve it, if made, were a sufficient acceptance by the city.

The passing of the ordinance, the making and approval of the contract, completion of the work according to the contract and its inspection by the engineer, the acceptance of the work and the making of the apportionment, are all to be proved by the record, and in the

absence of an allegation of fraud or collusion, the record is conclusive on all these points. *Murray v. Tucker*, 10 Bush 240, and many other cases.

There is nothing in the charter which, in our opinion, requires the general council to provide in the same ordinance for all the work necessary to complete the improvement of a street, and no reason exists in the nature of the subject which can authorize this court to say that the council may not exercise its judgment as to whether all should be done at once or not.

The appellants do not point out in their answer any special objection to the apportionment. Their language is that the apportionment is "unequal, illegal, erroneous and void." When an apportionment is illegal the defendants should by answer point out in which particular it is so, that the court and not the pleader may decide whether it is illegal. This is not only a familiar elementary rule of pleading, but has been expressly applied by this court to this particular question. *Dulaney v. Bowman*, 8 Ky. Opin. 592.

But there was no attempt to prove that the ordinance had been published as required by the charter, and as we have heretofore decided, such publication must be made before an ordinance can be enforced.

If the appellant can indicate in what respect the apportionment is unequal they should be allowed to amend their answer so as to have the correction made, and each party should be allowed reasonable time to make further proof.

Judgment *reversed* and cause remanded for further proper proceedings.

J. R. Boone, W. P. D. Bush, for appellants.

S. B. Richardson, for appellees.

LOUIS SNYDER v. BEN HARRISON.

Attorney and Client.

In the absence of a special agreement to the contrary debts are payable in money, and an attorney receiving an account for collection from his client has no authority to accept in payment any thing in lieu of money, but where an attorney does accept orders, etc., as payment, and the orders are collected by him while he is still representing his client, it will constitute payment.

APPEAL FROM HENDERSON COURT OF COMMON PLEAS.

March 8, 1879.

OPINION BY JUDGE COFER :

The appellant brought this action on an account for \$137.20. The appellee pleaded payment, and verdict and judgment having been rendered in his favor, the appellant prosecutes this appeal.

The appellee was introduced as a witness in his own behalf, and testified that he was called upon by A. J. Anderson, an attorney at-law, who had in his possession a copy of the account sued upon, and said it had been placed in his hands for collection, and that having no money he delivered to Anderson in payment thereon \$50 in script issued by the city of Henderson, worth not more than ninety-five cents on the dollar, and an order on H. H. Shouse for \$30 or \$35, and that he had subsequently paid to Anderson the balance of the account and had taken his receipt in full, which he exhibited on the copy of the account which had been in Anderson's hands.

On cross-examination he stated, in substance, that the account was afterward presented by Mr. Ward, the attorney who brought this action; that he had then paid to Anderson \$80 or \$85, and told Ward he would pay the balance as soon as he got the money; that he then had no receipt from Anderson, and did not then know whether he had collected the script or the order on Shouse, but had subsequently learned from Anderson that he had collected both; that Ward told him not to pay anything more to Anderson; that he, witness, had placed some accounts in Anderson's hands for collection, and Anderson owed him some small amounts and said he had collected enough on the accounts, with what he owed witness, to pay the balance of the account and gave him the account receipted in full.

The appellant introduced Mr. Ward, who stated that when he called on the appellee and told him to pay nothing more to Anderson he promised that he would not. This was all the evidence material to be stated.

The court refused to instruct the jury that Anderson had no right to accept the city script or the order on Shouse, accounts on third persons, or his own indebtedness to the appellee, in payment of the claim in his hands for collection, and that they must find for the plaintiff, and instructed them that if they believed from the evidence that Anderson had the account in his hands for collection, and the appellee, while it was in his hands, settled and paid the same, in whole or in part, to Anderson, they should find for appellee for the amount so settled and paid.

There being no evidence to show that Anderson had any special authority from his client, his powers must be assumed to have been only such as were incident to his employment as an attorney to collect the debt.

In the absence of a special agreement to the contrary, debts are payable in money, and therefore a simple employment to collect a debt confers authority to receive payment in money, and does not confer authority to accept anything in lieu of the money. 1 Parson on Contracts, 117; *Smith's Heirs v. Dixon, Barrett, et al.*, 3 Me 438.

In such a case the attorney is the agent of the creditors to receive that which the creditor has a right to demand. That is the scope of his agency, and his acts, like those of any other agent, bind his principal only when within the scope of his agency. We are therefore of the opinion that the receipt of the city script and the order on Shouse was not a payment on the debt, and it is clear that collections made by Anderson on debts placed in his hands to collect for appellee, and his individual indebtedness to appellee, were not and could not be made to operate as payments on appellant's debt.

But we are of the opinion that if Anderson collected the money on the script or on the order on Shouse before his authority as appellant's attorney was revoked, and the appellee was notified not to pay to him, the money thus received should be regarded as payment for although the attorney had no authority to receive choses-in-action for appellant, he had authority to receive money from anyone the appellee might procure to pay it for him. Until the money was received on the choses-in-action Anderson held them for appellee, and unless he was appellant's attorney with authority to collect the debt when he received the money it never came to his hands as such attorney, and consequently is no payment. Anderson's declarations made after he ceased to be appellant's attorney were not competent to prove that the script and order had been collected.

Wherefore the judgment is *reversed* and cause remanded for a new trial upon principles not inconsistent with this opinion.

Thomas E. Ward, for appellant.

D. S. WATSON v. W. W. STRUNETT, ET AL.

Homestead Exemption.

When a landowner owns and cultivates twenty-one acres of land composed of a seven-acre tract and a fourteen-acre tract, divided by a small tract belonging to another, he residing on the seven-acre tract, worth less than one thousand dollars, he is entitled to claim his homestead exemption as against a levy on the fourteen acres for the excess over the value of the seven acres up to one thousand dollars.

APPEAL FROM TODD CIRCUIT COURT.

March 8, 1879.

OPINION BY JUDGE ELLIOTT:

Appellant, with his brothers and sisters, inherited a farm from their mother. At the time of his mother's death he resided on a part of this land by her permission.

In the division of this tract of land among the Watson heirs the commissioner allotted fourteen acres, including the appellant's residence, and also some seven acres located some half-mile distant to appellant. Between the seven acres and fourteen acres a lot that had been laid off to another one of the heirs intervened. As the fourteen acres was without timber for fuel, appellant built him a residence and moved on the seven-acre tract, but continued to cultivate the fourteen acres, it being the cleared land he owned, and therefore the only land fit for cultivation.

After the division among Mrs. Watson's heirs and after appellant had moved on the seven-acre tract, the appellee, Smith, caused the fourteen acres to be levied on and sold on a fi. fa. in his favor against appellant, and to prevent the purchaser from taking possession on his purchase this suit was brought, and the only question is as to whether the defendant in an execution where the land on which he resides is worth less than a thousand dollars, can make up the deficiency out of land which, although not adjoining it, is used as a part of the same farm.

The homestead law does not require that the homestead shall only include one tract of land. It says, "so much land, including the dwelling house and appurtenances owned by the debtor, as shall not exceed in value one thousand dollars" shall be set apart to the debtor by the levying officer.

The thousand dollars' worth of his land must include his dwelling

house and appurtenances, but if such dwelling-house tract is worth less than one thousand dollars, we think the deficiency can be made up out of a tract which, although not adjoining, is a part of the same tract.

If the execution creditor had levied on this land before the division among the Watson heirs, it is admitted that appellant could have had it allotted as a part of his homestead. The two parcels are part of the same tract of land, and were acquired by appellant by the same title and at the same time, and are used by him as the same farm, the seven acres being used for fuel and the fourteen acres for cultivation. We are therefore of opinion that if the parcel of land which embraced appellant's residence was worth less than a thousand dollars, the deficiency should have been made up out of the fourteen acres which, although not adjoining, was used as a part of appellant's farm according to the pleadings, etc.

Wherefore the judgment is *reversed* and cause remanded for further proceedings consistent with this opinion.

H. G. Petrie, for appellant.

CLARK WILLIS v. JAMES MCNEAL'S ADM'R.

Amending Petition on Appeal.

A plaintiff cannot upon an appeal to the circuit court amend his pleadings so as to set up a new and independent cause of action. The cause of action to be tried on the appeal must be the same that was tried in the lower court.

Continuance of Cause.

The defendant, not having waived his right to do so by his lack of diligence, has a right to set up any valid defense that exists, and where judgment is deferred before a trial the court allows the defendant to file an amended answer in a proper case he should continue the cause to permit the plaintiff time to prepare to meet the new defense pleaded.

APPEAL FROM OWEN CIRCUIT COURT.

March 13, 1879.

OPINION BY JUDGE COFER:

A plaintiff cannot, upon an appeal, amend his pleadings so as to set up a new and independent cause of action. The case, i. e., the cause of action, to be tried on the appeal, must be the same that

was tried in the lower court. But to that case the defendant has a right to make all the defenses he has. If he fails to set up any defense and allows judgment to go by default, it is within the discretion of the court in which the appeal is pending for a trial de novo to allow an answer to be filed. So, too, that court may in the same way allow the defense to be changed or new defenses to be made as if the case had been originally brought in that court. Every existing defense to a cause of action must be made before a final trial, or it will be lost entirely. If any valid defense exists, the defendant had a right to set it up at any time, unless he has waived the right or lost it by his laches. In this case the circuit judge in the exercise of his discretion allowed the amended answer to be filed, and on the suggestion of the plaintiff that he was not ready to proceed with the trial, continued the case at the defendant's cost. This seems to be all that justice or law demanded.

The evidence was conflicting, and this court cannot reverse on the ground that the preponderance may be against the appellee. The appellant, having no subsisting cause of action against the appellee, was properly adjudged to pay the costs in both courts.

Judgment *affirmed*.

Strother & Co., for appellant.

H. P. Montgomery, James Blackwell, for appellee.

GEORGE SMITH v. COMMONWEALTH.

Criminal Laws—Indictment.

An indictment for housebreaking with intent to steal is not good against a demurrer when it fails to charge the breaking with intent to steal therefrom any named article of value, the property of another. It is not sufficient to charge the breaking with intent to steal.

Confession as Evidence.

A confession in a criminal case obtained by the hope of immunity from punishment held out to the accused is not admissible as evidence against him.

APPEAL FROM BOURBON CIRCUIT COURT.

March 13, 1879.

OPINION BY JUDGE HINES:

We are of the opinion that the indictment does not charge a public offense either at common law or under the statute. It is not

good under Sec. 4, Art. 5, Chap. 29, General Statutes, because there is no charge of feloniously taking from the premises broken into the specific property of a named individual. It requires both a felonious breaking and a felonious taking of the property of another to constitute the offense. It is equally clear that the indictment is not good under the 4th section, Art. 6, Chap. 29. There is no charge of breaking the house with intent to steal therefrom any named thing of value, the property of another. See *Warrick v. Commonwealth*, 14 Bush 233.

The statement of the witness, Kelly, as to what appellant said in regard to taking the flour, was incompetent, and should therefore have been taken from the jury on motion of appellant's counsel. The witness does not pretend to state even the substance of all that appellee said in the conversation and in reference to the taking. But if that were the case and it conclusively appeared that the accused said nothing more than was detailed by the witness, still the statement should have been rejected, because it was evidently obtained by the hope of immunity from punishment held out by the witness. It is incredible that the witness should remember so distinctly the inculpatory statement of appellant and yet not be able to remember whether he held out a specified inducement to appellant in order to secure the confession. The answers of the witness on cross-examination are equivalent to an affirmative statement that he did hold out the inducement indicated, and as the court, and not the jury, should pass upon a question of the competency of evidence, there was error in not rejecting the whole of the pretended confession.

These conclusions render it unnecessary to pass upon the other questions suggested by counsel for appellant. Wherefore the judgment is *reversed* and cause remanded with directions for further proceedings consistent with this opinion.

Charles Offutt, for appellant. Moss, for appellee.

ELIZABETHTOWN, LEXINGTON & BIG SANDY R. CO. v. CATHERINE RESNITT, ET AL.

Damages by Independent Contractor.

Where the work of constructing a railroad is not a nuisance, and the contractor by his contract to construct is not given the right to trespass on the land of another, the wrongs of the contractor in committing a trespass are not chargeable to the railroad company unless ordered by the company's engineer.

APPEAL FROM FAYETTE CIRCUIT COURT.

March 13, 1879.

OPINION BY JUDGE PRYOR:

The company was in lawful possession of its road bed and the right-of-way granted by the owner of the land. It had the right to enter for the purpose of constructing its road, and to use the road bed so as not to injure the adjacent property. In constructing the road it became necessary to have the work done under contracts, and this part of the road or its construction was turned over by the company, under a contract it had full power to make, to Bibb, Loftor and others, with the right on the part of the latter to go on the company's road bed or the way granted by the owner for the purpose of construction.

The injuries complained of did not necessarily arise from the work that the contractors had undertaken to perform. They had the right to enter. The contract was legitimate. It was guarded so as to protect the rights of all, and the only interest or power the company had over it was to see, by its agents, that the contractor complied with its terms. The work was not a nuisance, nor any right given by the company to the contractor to trespass on appellee's land. The fact that the engineer had the right to direct the deposit of any stone or rock that might be excavated on the side of the road, did not make the company liable for the wrongs of the contractor, unless ordered by the engineer. The road must be completed to the satisfaction of the engineer; still it was an independent contract, and the contractor was the loser if he failed to comply with the terms of his agreement. The company could not well construct its road without making such contracts, and in this case the stipulations are specific, the plan and mode of construction clearly defined, with the right of the contractor to go upon the way and comply with its terms. If this is not an independent contract it would be difficult to make one. It seems to us the company cannot be held liable unless the injury complained of was the result of the directions given by the company's engineer or agent, and this cannot be implied from the contract itself. Judgment *reversed* and cause remanded for a new trial.

Breckinridge & Shelby, for appellant.

Houston & Mulliken, William Lindsay, for appellees.

ALEXANDER OVERLY *v.* THOMAS D. RING, ET AL.**Husband and Wife.**

Where the wife conveys her land as a security for her husband's debt, and the husband having paid the debt, the title re-vests in her as the owner, and hence one purchasing the land upon execution sale against the husband, the wife having died, acquires only the life estate which the husband held as tenant by the curtesy.

APPEAL FROM TODD CIRCUIT COURT.

March 15, 1879.

OPINION BY JUDGE ELLIOTT:

Thomas Donnelly died the owner of a large tract of land in Todd county, and in a suit for division between his heirs the land in dispute was allotted to his daughter, Nancy, who was then the wife of Nicholas Ring. A deed was made to Nancy Ring by the commissioners who allotted her the land, and their report confirmed and the deed certified to and recorded in the office of the Todd County Court. In 1847 Nicholas Ring and his wife mortgaged this land to Judge Underwood to secure him in some lawyer fees, and by Underwood's suit for foreclosure the land was sold in 1855, and Nicholas Ring bid it in and paid off the mortgage debt. Afterward Smith and Tyler had the land levied on by virtue of their executions, and on its sale Tyler bought it and afterward sued Ring and recovered and turned him out of possession, and he and Smith conveyed the land to appellant.

Ring acquired no title by his purchase under the judgment foreclosing Underwood's mortgage because he paid nothing for it. Mrs. Nancy Ring conveyed her land as a security for her husband's debt, and her husband having paid the debt the title re-vested in her as the owner, and consequently Tyler, by his purchase, only acquired the life estate which Ring acquired as tenant by the curtesy.

It is suggested that Mrs. Ring had died before the sale under Underwood's mortgage, and if that is so her title descended to and vested in her heirs-at-law, and as there was no revivor against her heirs her title never passed by the sale under the judgment. But the appellant derived his title from Nicholas Ring, and as Ring, according to appellant's own showing, never owned but a life estate in the land, that was all Smith and Tyler acquired by their purchase and was all that they conveyed to appellant.

Wherefore the judgment is *affirmed*.

G. Terry, for appellant. W. L. Rhodes, for appellees.

GEORGE KLEIN v. NEWPORT COMMISSION & MORTGAGE ASS'N.

Bill of Exceptions.

When a judgment was rendered and a motion for a new trial was overruled at the October term of the court in 1877, the court had no power to extend the time for preparing and tendering a bill of exceptions beyond a day in the February term, 1878; and no bill having been filed at that term, the right to file it was lost, and one filed at the succeeding term is not part of the record on appeal.

APPEAL FROM CAMPBELL CIRCUIT COURT.

March 18, 1879.

OPINION BY JUDGE COFER:

The omission to allege in the petition that \$14,000 had been subscribed was cured by the answer, in which it was denied that that sum had been subscribed, thus making an issue on that point.

The verdict and judgment were rendered, and the motion for a new trial was overruled at the October term, 1877, and the court had no power to extend the time for preparing and tendering a bill of exceptions beyond a day in the February term, and none having been filed at that term the right to file it was lost (Sec. 334. Civil Code), and the bill filed at the succeeding term cannot be considered by this court as a part of the record.

Judgment *affirmed*.

W. J. Berry, for appellant. J. R. Hallam, for appellee.

WILLARD VEACH v. SALLY M. TAYLOR'S ADM'R.**Petition on Vendor's Lien.**

An allegation in a petition to enforce a vendor's lien is bad on demurrer which avers only that "said land lies in Daviess county, for which a deed has been made by this plaintiff, Junius May, and the deed duly acknowledged and recorded in county court clerk's office, a copy of which is herewith filed and made a part hereof, the vendor holding a true and perfect title to same, subject only to the lien retained by the notes sued on herein," for such averments fail to show that there is a valid lien on the land to secure the notes.

Pleading Legal Conclusions.

To allege simply that the vendor retained a lien in the deed is the allegation of a mere conclusion of law. Facts and not legal conclusions must be pleaded.

APPEAL FROM DAVIESS CIRCUIT COURT.

March 18, 1879.

OPINION BY JUDGE COFER :

Tested by the rule announced in *Huffaker v. National Bank of Monticello*, 12 Bush 287, the petition in this case was insufficient to authorize a personal judgment on the notes sued upon.

The petition is also defective in another respect. The plaintiff sought to enforce a vendor's lien on land conveyed while the Revised Statutes were in force. The petition did not contain an allegation that the plaintiff had a lien, or that a lien had been retained.

The petition contains this statement and no other in respect to the lien. "Said land lies in Daviess county, for which a deed has been made by this plaintiff, Junius May, and the deed duly acknowledged and recorded in county court clerk's office, a copy of which is herewith filed and made a part hereof (which does not appear to have been done), the vendor holding a true and perfect title to same, subject only to the lien retained by the notes sued on herein." This is certainly not sufficient to show that there is a valid lien on the land to secure the notes.

Conceding that a lien, valid between the parties, might have been given by appropriate language in the notes, they contain no intimation that it was intended to create or retain such a lien. It has been the general practice in such cases to allege that a lien was retained in the deed, and this practice has been generally if not universally acquiesced in. But tested by the ordinary rules of pleading, even that is not sufficient. The statute declared in substance that the vendor should not have a lien for purchase money unless it was stated in the deed what part of the purchase money remained unpaid.

Whether there is a lien therefore depends upon the question whether that provision of the statute was complied with. To allege simply that the vendor retained a lien in the deed is the allegation of a mere conclusion of law, and violates the rule which requires facts and not legal conclusions to be stated in a pleading. But the petition in this case does not contain even an allegation of a conclusion of law. There is at most only a statement in the form of a recital, and not the allegation of a fact, that the vendor's title was "true and perfect, subject only to the lien retained in the notes sued on."

This was clearly not sufficient under the most liberal rules of pleading. The agreement to pay interest at 10 per cent. should be construed to mean 10 per cent. per annum. Such is the common understanding of such a phrase, and was no doubt what the parties intended, and the writing imports a consideration, and it was unnecessary to allege a consideration.

But the additional four per cent. promised by that agreement is no part of the price of the land, nor is it an incident to it. The consideration for the promise to pay it was no doubt an agreement to grant indulgence, and being for indulgence and not for a part of the price of the land there is no lien to secure it, any more than there would be to secure a separate note given for an aggregate sum for a like consideration.

Judgment *reversed*, and cause remanded for further proper proceedings.

Riley, Jolly & Walker, for appellant.

McHenry & Haynes, for appellee.

NAT MONTAGUE, ET AL., v. NATHAN MAHAN.

Judgment Conclusive.

Where the vendee of real estate brings an action against another claimant for the land in ejectment, and the title is put in issue and judgment rendered for the defendant, the privity between the vendor and vendee is such as to make the action on the part of the vendee against these parties conclusive in an action in ejectment afterward instituted by the vendor against the same parties to recover the same land.

APPEAL FROM SIMPSON CIRCUIT COURT.

March 20, 1879.

OPINION BY JUDGE PRYOR:

It is distinctly averred in the answer of the appellants that the vendee of the appellee instituted an action of ejectment against him for the recovery of this identical land, that the title was placed in issue by the answer, and upon the trial the jury found for the defendants. The appellee in his reply admits the institution of the ejectment by Neely, and that a judgment was rendered for the defendants, but denies that he is estopped to institute another action, by reason of the former verdict and judgment against his vendee.

Why the judgment is not conclusive we cannot well see. The privity between the vendor and vendee was such as to make the action on the part of the vendee against these parties conclusive in the present action on the part of the vendor to recover the same property. There is nothing in this record to show that there was a non suit in the action brought by Neely, but on the contrary there was a verdict and judgment for the defendants. The court below should have adjudged on the pleadings in favor of the appellants.

The judgment is *reversed* and cause remanded for further proceedings consistent with this opinion. The court may in its discretion allow the reply to be amended, but this court will not so direct. *W. M. Gorin, for appellants. G. W. Whitesides, for appellee.*

LEWIS R. KEENE, ET AL., v. LOUISVILLE SAW MILL COMPANY.

Liability for Purchase Price of Goods.

Where a number of citizens meet to arrange for a public entertainment and elect a president, but take no action looking to the purchase of lumber for use in preparing for the entertainment, but the president orders lumber which is charged to him, and upon his credit, he alone is liable for the price of such lumber.

Partnership.

When there is no partnership by agreement between the parties composing a so-called association, and where there has been no holding out to the public by means of which credit has been obtained, and when there is no agreement to share in profits and no benefit derived, no liability as partners can exist.

APPEAL FROM JEFFERSON COURT OF COMMON PLEAS.

March 20, 1879.

OPINION BY JUDGE HINES:

We are of the opinion the peremptory instruction asked by appellant should have been given. The extent to which the evidence went was that appellants, with many other citizens of Louisville, assembled together for the purpose of having a parade on Mardi Gras day, to be followed by a ball at night. Andrewatha was made president, appellant, Keene, was chairman of the finance committee, with the duty of soliciting and collecting subscriptions to aid in the display, while appellant, Bradley, was appointed and acted on the

committee on printing. After this temporary organization, under the name of the Mardi Gras Association, it was informally determined in a public meeting of those participating to have a ball the night following the parade. Tickets were to be sold and their proceeds applied to the payment of the expenses.

At one of these meetings there was some discussion as to what should be done with the surplus, after defraying expenses, of the moneys that might be received for tickets, but no determination was had. Andrewatha, the president, without any authority from appellants or from the association as a body, ordered of appellees a large quantity of lumber to be used in preparing the hall for the dance, although he states that it was not necessary, as the hall would have answered the purpose without incurring any expense for lumber. In ordering the lumber Andrewatha directed it to be charged to the association, stating that he would see it paid. There is no evidence that appellants knew of the intention to purchase the lumber, but after the lumber had been delivered at the hall, Keene ascertained the fact of its delivery and made some objection to the unnecessary outlay, when Andrewatha informed him that he, Andrewatha, was responsible.

There is nothing to show that appellee knew that appellants were connected with the association at the time of the purchase of the lumber, or that they looked to appellants for compensation; but upon the other hand the evidence showed that the credit was extended to Andrewatha, and not to the association or to any one of its members. The money received from the sale of tickets, as well as that received from the sale of the lumber, appears to have been distributed to pay the expenses of the undertaking, and nothing being left with which to pay the claim of appellee, suit was brought and recovery had against the appellants. Appellants do not appear to have had anything to do with selling the lumber, or with the distribution of the proceeds of the sale.

Appellee's right to recover must rest either upon authority given Andrewatha to bind them for the purchase, or they must have, in some way, held themselves out as partners and induced the credit to the association thereby. When there is no partnership, by agreement between the parties composing the so-called association, where there has been no holding out to the public by means of which credit has been obtained, and when there is no agreement to share

in profits and no benefit derived, no liability as partners can be said to exist.

But, waiving consideration of the evidence, it is clear that the following instruction is erroneous: "If the jury believe from the evidence that the defendants, Bradley and Keene, or either of them, united with others in forming an association with John Andrewatha as president for the purpose of a 'Mardi Gras' celebration, and aided or participated in the getting up and management of the same, the plaintiff is entitled to recover the debt claimed against both or either, according as the jury may, under the evidence, find that both or either so united in said association, and so acted or participated."

Under such an instruction the jury, having found that these parties took part in getting up the celebration, would be compelled to find appellants personally responsible for the purchase made by Andrewatha, although they might believe that the credit was extended to Andrewatha alone, and that appellants received no benefit whatever from it and never authorized and never ratified it, and that the lumber so furnished was neither necessary nor proper as a means to accomplish the end for which the association was formed.

We deem it unnecessary to notice further the points made by counsel or to review the authorities cited. It is sufficient to say, first, that the evidence does not justify the verdict, and, second, the court erred in giving the instruction quoted.

Wherefore the judgment is *reversed* and cause remanded with directions for further proceedings consistent with this opinion.

C. H. Gibson, M. Mundy, for appellants.

Barrett & Brown, for appellee.

CATHERINE J. JOHNSON, ET AL., *v.* MARY HALL STEWART, ET AL.

No Estoppel as to Infants.

Infants are incapable of perpetrating a fraud or of binding themselves by contract or by estoppel.

Life Tenant.

A tenant for life cannot expend money in building upon the land, and charge it on the estate in remainder or make it a personal charge against the remainderman.

APPEAL FROM LOUISVILLE CHANCERY COURT.

March 20, 1879.

OPINION BY JUDGE HINES:

The only question to be considered is whether appellee, claiming through the life tenant, I. R. Webb, is entitled to recover against the infant appellants, owners of the remainder, for lasting and valuable improvements made on the land by the life tenant.

The cases in general where the court has allowed compensation for lasting and valuable improvements made by the complainant upon the land of another proceeded upon the ground of fraud, estoppel or mutual mistake as to title.

At the time these improvements were made the appellants, in whom the remainder subsequently vested, were not in being, and they are still infants. They were incapable of perpetrating a fraud or of binding themselves by contract or by estoppel. There could, of course, be no such thing as a mutual mistake as to when the fee was vested or would vest. If I. R. Webb made the improvements on the land upon the false assumption that he had absolute title to the property, he was not led to that conclusion by the conduct of these appellants, nor of any one through whom they claim. Under the same will that gave the life estate to I. R. Webb, these appellants claim the remainder, and the mistake, if made, was with full knowledge on the part of I. R. Webb, of all the facts that went to affect the title. In this controversy it is immaterial whether I. R. Webb was induced by the trustees to make the improvements, or made them without persuasion or advice from any one. The rule is that a tenant for life cannot lay out money in building upon the land and charge it on the estate in remainder, or make it a personal charge against the remainderman; and we have found no adjudged case making this an exception. *Caldecott v. Brown*, 2 Hare (Eng. Ch. Rep.) 144; *Gray v. Oyler*, 2 Bush 256; *Cannon v. Hare*, 1 Tenn. Ch. 22; *Haffick v. Strober*, 11 Ohio St. 482; *White v. Arndt*, 1 Wharton 90; *Doak v. Wiswell*, 38 Me. 569; *Maddocks v. Jellison*, 11 Me. 482.

A majority of the cases relied on by counsel for appellee, in which payment for improvements has been allowed, are cases where persons making the improvements did so in good faith, believing the property belonged to him. In this case I. R. Webb must be presumed to have known what his interest was, and to hold otherwise would not only work a hardship to appellants, but would be to establish a rule under which the life tenant could destroy the estate in

the remainder by simply insisting that he did not understand the legal effect of the evidence of title under which he entered.

If appellee was entitled to compensation, the court could not grant it, as was done in this case, by setting aside to appellee and vesting in her the title to another specific piece of property, the legal title which is in appellants. There is no power in a court of equity thus to divest title.

Wherefore the judgment is *reversed* and cause remanded with directions to dismiss so much of the petition as seeks to recover for the improvements made on the property by I. N. Webb.

R. B. Muir, for appellants. Harlan & Wilson, for appellees.

JOHN W. HARDIN, ET AL., v. ISAAH HILL.

Tender of Bill of Exceptions.

The appellee is not bound to take notice of a tender of a bill of exceptions to the judge, and he is only bound to take such notice when such a bill is filed in the court on the day designated for such purpose; and where the record fails to show that a bill of exceptions was presented on the first day of the term, or that the time was extended to another day, the filing of the same on some other day is not notice to the appellee of its filing.

APPEAL FROM WASHINGTON COURT OF COMMON PLEAS.

March 20, 1879.

OPINION BY JUDGE ELLIOTT:

We are of opinion that the plaintiffs' petition in this action sets out a good cause of action, and the question as to whether there are any grounds made out for reversal depends for solution on whether the court can take judicial notice of the appellants' bill of exceptions.

The judgment in this action was rendered at the November term, 1877, of the Washington Court of Common Pleas, and at that term the appellants' motion for a new trial was overruled, and time given them until the first day of the ensuing May term of the same court to prepare and file their bill of exceptions. The records of the first day of the May term of the court, 1878, do not show that any motion or order in this case was made on that day, but the record does show that on the 6th day of the court the following order was made in this suit.

"ISAIAH HILL, Plaintiff,

v.

JOHN W. HARDIN, AND ISAIAH PRATHER, Defendants.

In Ordinary.

"The defendants having on the first day of this term of this court tendered a bill of exceptions in this case, and the court not having time to examine said bill of exceptions, took time until Wednesday, May 29, 1878, the sixth day of the present term, and on said day the court took up and examined, approved and signed said bill of exceptions, and ordered that the same be filed and made part of the record in this case, which is accordingly done."

The record of the first day's proceedings of the May term of the lower court, 1878, fails to show that any bill of exceptions was tendered in court, or that any further time was asked or given to prepare one, and the statement on the 6th day of the term that the bill was tendered to the court on the first day thereof, in the absence of any evidence of that fact, can only mean that the bill was tendered or handed to the judge of the court, who had held it up till the sixth day of the term, when he signed it; but the appellee was not bound to take notice of this tender of the bill to the judge. He had notice that the bill would be presented on the first day of the term, and when no order had been made in it on that day the appellee had a right to presume that the appellants had abandoned the intention of filing their bill of exceptions.

Therefore, as the record fails to show that the bill of exceptions was presented on the first day of the term, or that the time therefor was extended, the appellee being no longer in court must be presumed to have had no notice of the tender or presentation of the bill that was filed in this case.

The court could only act by its recorded orders, and having made no order on the first day thereof extending the time to the sixth day of the term, the act was unauthorized and void, and such bill of exceptions cannot be taken notice of by this court, as it composes no part of the record; and in the absence of any bill of exceptions showing the evidence and rulings of the court we must presume that the verdict and judgment result from proper rulings and sufficient evidence.

Wherefore the judgment is *affirmed*.

Brown & Lewis, T. B. Hill, W. C. McChord, for appellants.

W. H. Hayes, L. R. Thurman, for appellee.

BENJAMIN P. PETTY *v.* JOHN S. FUQUA.**Consideration for Note.**

A note executed in consideration that the payee will induce the delivery of a horse won at a game of cards is not valid, since there is no consideration to base it upon. Such a note is unenforceable even in the hands of an innocent holder.

APPEAL FROM OHIO CIRCUIT COURT.

March 22, 1879.

OPINION BY JUDGE HINES:

No question is presented except as to the sufficiency of the evidence to support the verdict. The proof, without conflict, is to that effect that the consideration for the note was a horse won by Gross of appellant at a game of cards. Conceding the existence of every fact that the jury may have found from the evidence, yet we are of the opinion the judgment and verdict are unauthorized. It matters not that the horse was transferred by Gross to Hedden, as the jury may have found, and that the note was executed to Hedden in consideration of his having secured or induced the re-delivery of the horse to appellant; nor does it matter that Hedden surrendered his claim on Gross in consideration of the execution of the new note. Hedden is in no better attitude than he would have been if he had paid value for the note to Gross and had it indorsed to him. Petty could have recovered the horse either of Gross or Hedden, and there was therefore no consideration for the note. It was absolutely unenforceable, even in the hands of an innocent holder. *Brittain v. Duling*, 15 B. Mon. 138; General Statutes, pp. 495-496, Sec. 1 and 2. Whatever defense Petty could have made to the note in the hands of Hedden he can make against Hedden's assignee.

The court should have directed the jury to find for the appellant. The facts of this case appearing in the record do not bring it within Section 341 of Civil Code.

Wherefore the judgment is *reversed* and cause remanded with directions for further proceedings consistent with this opinion.

Townsend & Massie, for appellant.

Walker & Hubbard, for appellee.

FRANCES MONTGOMERY v. J. P. MURRAY'S ADM'RS.

Averments of Administrator's Appointment.

Before one can maintain an action as administrator he must allege that the court having jurisdiction to appoint administrators has appointed him, and that he has executed the required bond, and accepted the trust.

APPEAL FROM ADAIR CIRCUIT COURT.

March 22, 1879.

OPINION BY JUDGE ELLIOTT:

This action was brought by the appellees as administrators of James P. Murray, in the Adair Circuit Court, and on hearing they obtained judgment by default on a note for about \$500 and a sale of some mortgaged lands for its payment.

The only allegations that appellees have a right to sue as administratrix and administrator of James P. Murray are the following:

"The plaintiffs, E. A. Murray and T. D. Todd, state that on the — day of —, 18—, James P. Murray departed this life intestate, and that on the 17th day of March, 1877, they were duly appointed as administrators, and they executed bond and took oath as required by law."

The statement by appellees that they were duly appointed administrators of J. P. Murray is a mere conclusion of law. Before they can sustain an action as Murray's administrators, they must allege that the court, having jurisdiction to appoint administrators, has appointed them, and that they executed the required bond and accepted the trust.

The petition fails to show that any tribunal legally authorized to do so has appointed the appellees to the fiduciary position assumed in this action. They do not even state where James P. Murray died domiciled, so that the court could determine where administration should have been had on his estate. The plaintiffs therefore failed to allege facts which authorized them to sue in the assumed fiducial character.

Wherefore the judgment is *reversed* and cause remanded for further proceedings consistent with this opinion.

T. C. Winfrey, for appellant. Rhom & Jones, for appellees.

DANIEL MCCARTY, ET AL., v. LEWIS N. WILSON.

Specific Performance.

Where a title bond is executed to convey a described boundary land at a given price, and it was agreed and stated that the boundary contained $72\frac{1}{4}$ acres and eleven poles, and it is ascertained that after that the tract contained 75 acres, it was decreed by the chancellor that the vendor should convey all the tract owned by him included in the bond, but that the vendee should pay the vendor for the extra land received.

Discretion of Court.

The court has a large discretion in enforcing the specific execution of contracts, and the court of appeals will not reverse in the absence of the abuse of such discretion.

APPEAL FROM KENTON CHANCERY COURT.

March 25, 1879.

OPINION BY JUDGE ELLIOTT:

On the 28th day of August, 1876, the appellants sold and executed their title bond to convey to appellee a described boundary land at the price of \$3,300. It was agreed and so stated that the boundary contained $72\frac{1}{4}$ acres and 11 poles.

Afterward it was ascertained that the tract contained about 75 acres, and under the plea that there was a mistake in the boundary of the bond appellants took possession of about three acres of the land and tendered a deed to appellee for the balance. Appellee refused to accept the deed, and brought this suit for a specific execution of the contract.

The evidence conduces to prove that at the time the bond was executed the appellants wished to retain a small part of this land, but we think that appellee did not consent to exclude any part of the boundary, and if such agreement was made it is ineffectual to vary the boundaries or contradict the terms of the written agreement. But the evidence conduces to prove that appellee agreed that he only bought $72\frac{1}{4}$ acres and 11 poles, and he appears to have thought at one time that he could only obtain a conveyance for that number of acres.

The chancellor on the hearing adjudged that the appellants should convey all the tract owned by them included in the bond, but appellee should pay appellants for all the land over $72\frac{1}{4}$ acres and 11 poles at the same rate that he was to pay for that number of acres.

We think that this judgment should not be disturbed. The parol agreement insisted on by appellants seems to have been made when the bond was executed, and therefore cannot vary its terms, and therefore appellee is entitled to the boundaries described by the bond, but as he bought $72\frac{1}{4}$ acres and 11 poles only, and so afterward agreed, and as both parties were confident that the land embraced by the bond contained only 72 and a fraction acres it was not inequitable to require appellee to pay at the same rate for the surplus land in the tract. Besides, the amount is small compared to the price paid, and as appellee agreed to pay the \$3,300 for the 72 and a fraction acres it is not inequitable to require him to pay for the extra land in the boundary purchased.

We think the appellants have no right to complain. They gave their covenant for the boundary, which appellee asked should be conveyed to him, and the parol agreement on which they insist should have been inserted in the bond. It is said that appellee agreed afterward to take the land embraced in the deed which appellants tendered him. But we think that the evidence disproves this assertion.

The court has a large discretion in enforcing the specific execution of contracts, and we cannot say that such discretion has been abused in this case. Wherefore the judgment is *affirmed* on the original and cross-appeals.

R. D. Handy, for appellants. C. Edginton, for appellee.

ABRAHAM WRIGHT, ET AL., v. MARY BOYD.

Title by Judicial Sale.

Where the court has jurisdiction of the parties and the subject-matter, the purchaser of land decreed to be sold acquires the title, however erroneous the judgment may be.

Dower.

Where a married woman has consented upon the record by an answer sworn to and filed to take a part of the proceeds of the sale in lieu of her potential right of dower, and it is afterward decreed that she is entitled to dower, it is error for the court not to enforce the agreement; but such error cannot affect the purchaser. She is entitled out of the proceeds of such sale to receive the value of her dower.

APPEAL FROM BATH CIRCUIT COURT.

March 26, 1879.

OPINION BY JUDGE PRYOR:

In the original opinion delivered in this case it was distinctly held that Mrs. Boyd was entitled to dower in the lands in controversy, or rather that had been sold to satisfy the debts of her husband, and the case was remanded with directions to have the proper parties brought before the court and her dower assigned. The rule that such a judgment is conclusive upon the parties to the controversy and their privies would certainly estop such parties from further litigating the questions involved in the judgment rendered, but it never applies to those who were not parties to the appeal or privies, and certainly never applies to a purchaser of the property sold by the judgment of the chancellor. So far as the purchaser is concerned, he holds under the sale made in pursuance of the judgment, and is as much a privy to the one party as the other. He acquires the title that all the parties to the record have unless the judgment is void. Where the court has jurisdiction of the parties and the subject matter the rule that the purchaser acquires title, however erroneous the judgment may be, is inexorable.

This was a proceeding originally instituted to settle the estate of Spencer Boyd and to subject certain lands devised by him to his son, Cyrus Boyd, to the payment of debts due the estate of the latter. The land having been devised to Cyrus Boyd, and he being indebted to the testator, the executor asserted a lien on the land and endeavored to maintain that the wife of Cyrus Boyd had no potential right of dower, and the court below so decided.

On an appeal to this court it was adjudged that she was entitled to dower for the reason that her husband had died after the rendition of the judgment, her claim depending alone upon her being the survivor; and that the fact of the husband's indebtedness did not affect his title acquired under the will. In rendering the opinion in that branch of the case, the court asserted her right to have dower assigned her, and that declaration is now urged as settling the rights of the purchasers. It must be conceded that the court had jurisdiction to sell the land and to determine the question of title, and the right of Mrs. Boyd to any interest in the land, either contingent or vested. The court below determined that she had no potential right of dower, and Mrs. Boyd brought the case to this court, and that was one of the errors for which it was reversed. In fact, an amended answer was filed by the appellee in the original case in February, 1868, alleging that on the 29th of March, 1866, at the in-

stance and request of the executor and others, she had filed an answer consenting to a sale on condition that she was to be provided with a house out of the value of her potential right of dower. This was no doubt the case, and she was at that time endeavoring to secure a part of the proceeds of sale, in accordance with the agreement between the parties and upon the conditions set forth in her original answer.

The original answer filed before the sale of the land was to the effect that she was willing for the whole of the land to be sold, if the value of her potential right of dower was secured. After this answer was filed the court rendered a judgment of sale, reserving the right to pass upon this question in the distribution of the proceeds of sale. The court below erroneously adjudged her not entitled, and therefore no part of the proceeds of sale was allotted to her. This court, in passing upon her rights on that appeal, did not, when deciding that she was entitled to dower, anticipate its effect on the rights of the purchasers.

Mrs. Boyd, although a married woman, had consented upon the record by an answer filed and sworn to, to take a part of the proceeds of the sale in lieu of her potential right, and the chancellor had by his judgment said, "If you are entitled at all, you shall have the money;" and his refusal to direct its payment was the subject of the appeal to this court. In order to present the claim more strongly to the chancellor, she alleged in the amended answer, filed in 1868, that she consented to the sale or filed the answer at the instance of the executor, etc.

It was simply error in the court not to enforce the agreement or give to Mrs. Boyd what she had agreed to take, and this error cannot affect the purchaser. If this were the first time the case had been to this court, and the chancellor had decided that, although her husband was dead, she was not entitled to dower by reason of a supposed lien the executor had upon the land, and directed its sale, the purchaser would hold, although the judgment might be reversed, because the chancellor had the jurisdiction to pass on the questions raised. Here the married woman voluntarily, or at the instance of others, appears in court and files an answer consenting to the sale on certain conditions. The sale is made, and we know of no rule of law or equity that would disturb the purchaser. The original record shows, too, that Mrs. Boyd was in good faith attempting after the sale to assert her right to the proceeds, and this was denied.

She was entitled out of the proceeds of sale to the value of her dower.

An amended answer and cross-petition has been filed in this case still asserting this right.

The judgment below is *reversed* and cause remanded for further proceedings consistent with this opinion.

Judge Elliott not sitting.

V. B. Young, W. H. Holt, William Lindsay, for appellants.

Reid & Stone, N. P. Reid, for appellee.

JOHN J. WISE *v.* MELTON FIELDS & WIFE.

Estoppel.

One who stands by and knows that another is purchasing land to which he has or asserts a claim, will be estopped to set up such claim to the prejudice of such purchaser.

APPEAL FROM FLEMING CIRCUIT COURT.

April 11, 1879.

OPINION BY JUDGE COFER:

Mrs. Fields states in her reply "that defendant, John J. Wise, was present and had knowledge that her brother, Marcus S. Wise, was selling and conveying to her the land, and that she was paying for it, and failed to answer or set up any claim to the same in any form." She relies upon these facts as an equitable estoppel to set up his parol purchase, or any right growing out of it to defeat or impair her right under that purchase.

To the reply no rejoinder was filed, and these facts, being affirmative and sufficient to estop the appellant, must for the purposes of this case be taken to be true. One that stands by and knows that another is purchasing land to which he has or asserts a claim, will be estopped to set up such claim to the prejudice of such purchaser. *Brothers v. Porter*, 6 B. Mon. 106; *Davis v. Tingle*, 8 B. Mon. 539.

Judgment affirmed.

T. L. Green, for appellant. Andrews & Sudduth, for appellees.

G. N. WELSH, ET AL., *v.* GEORGE FRYE, ET AL.

Statute of Frauds.

The statute is peremptory and conclusive which requires a memorandum in writing to be signed at the close thereof by the party to be charged therewith, or by his authorized agent, to bind him upon the sale of real estate.

Pleading Statute of Frauds.

A statement in the answer that the defendant "pleads and relies on the statute of frauds and perjuries," etc., is sufficient to entitle him to the benefit of the statute.

APPEAL FROM CASEY CIRCUIT COURT.

April 11, 1879.

OPINION BY JUDGE COFER :

This record presents but two questions which we deem it necessary to consider, viz: 1. Was there such written memorandum of the sale and purchase as was binding upon the appellant Welsh? 2. If there was not, has he become bound by accepting a deed or by the admissions in his answer?

The memorandum made by the auctioneer's clerk was not signed by any one. The statute requires a memorandum in writing, and that it shall be signed at the close thereof by the party to be charged therewith, or by his authorized agent. Sec. 1, Chap. 22, and Sec. 26, Chap. 21, General Statutes. This statutory provision is peremptory and conclusive.

There is some conflict in the evidence upon the question whether the deed was accepted. Frye and his two sons testified that Welsh told them, or stated to others in their presence, that the deed had come through and was all right, and there is some evidence that Welsh offered to sell or to rent the land.

On the other hand Welsh testifies that he did not accept the deed, and that he did not state to Frye or his sons that the deed was all right.

The evidence shows without contradiction that Welsh objected to the amount agreed to be paid to Frye and wife for the homestead and potential right to dower, and informed the trustee that he would not consent to it; and that he was informed by the trustee's attorney that he was not expected to agree to it; that that agreement was made by the trustee on his own responsibility. That agreement was, however, inserted in the deed, and by accepting the deed Welsh would have become a party to the agreement, and would have been estopped to deny it. It is true he is not a creditor, but he attended the sale as the representative of the bank of which he was president, and was not bound to accept a deed containing a stipulation he had not agreed to, and which, though not affecting him individually, might, through his relation to the bank, affect it.

Having declared, as all agree, he would not consent to the agreement between Frye and wife and the trustee, if he acted consistently, he must have declined to accept a deed in which that agreement was expressly stated as one of the terms, and his declaration made while informed of the agreement goes far to corroborate his statement that he did not accept the deed.

What he offered to sell or to rent the land for is not at all inconsistent with his refusal to accept the deed. These offers were made before he knew that the deed contained the objectionable provision, if his statement of the time when it came to his hands is true, and there is nothing to contradict that except the statements he is said to have made to Frye and his sons. According to his statement he did not receive the deed until four or five days after it ought to have reached Danville, and on the same day he informed one of his attorneys that he would not accept it, and on the next day he placed it in their hands to be returned, with the information that he would not accept it because of the objectionable feature concerning the homestead and dower.

He is still further corroborated by the fact that the trustee sued to compel him to accept the deed, and in the petition alleged that he refused to accept it, and repeated the statement in his answer to the suit of the bank. That statement has been stricken out of the petition, but still remains in the answer, and was accepted and reiterated by Frye, and is wholly inconsistent with his testimony.

The evidence of Welsh's declaration to Mr. Rhodes that he could not accept the deed was competent. The simple manual possession of the deed sent to him through the mail was not an acceptance that required the assent of his mind, and his declaration made at the time, and before any controversy had arisen was the best evidence of his intention. We are therefore constrained to the conclusion that Welsh did not accept the deed.

This court has repeatedly decided that in suing on a contract which the statute requires to be in writing the petition must show that it is in writing. *Hocker v. Gentry*, 3 Met. 463; *Smith v. Fahn*, 15 B. Mon. 443; *Byassee v. Reece*, 4 Met. 372.

The petition did not show that such a writing as is required by the statute had been executed, and was therefore defective. The original answer admitted the purchase, and it is contended that the statute was not therein sufficiently pleaded, and consequently that the answer furnishes the necessary written evidence of the contract.

Without stopping to inquire whether under our decisions such a contract can be enforced on the admissions of the answer without the express consent of the defendant, even though the statute be not pleaded, we are of the opinion that the statute was sufficiently pleaded. There is but a single provision of the statute which has any application to the contract set forth in the petition, and the statement in the answer is that he "pleads and relies on the statute of frauds and perjuries," etc. This was sufficient to entitle the defendant to the benefit of the statute; and even if it was not it was certainly an attempt to plead it, and the amended answer is full and formal and cures the defect. And this, too, although the rule may be that a defendant who answers and admits the contract cannot by a subsequent answer take advantage of the statute. That rule can only apply when in the original answer there is no attempt to plead the statute. If this were not so then a defendant intending all the time to seek the protection of the statute might lose his right by an unskilful plea, and be unable to regain it by an amendment offered the next day or even the next hour.

Under our liberate practice a party is not thus to lose a right specially secured to him by a salutary statute. We are therefore constrained to *reverse* the judgment and remand the cause, with directions to dismiss the petition of the trustee, and for further proper proceedings in the other case.

Vanwinkle & Rodes, Durham & Jacobs, for appellants.

Russell & Arritt, for appellees.

MARTIN SCOTT, ET AL., v. W. T. SCOTT Ex'x.

THOMAS B. SCOTT, ET AL., v. SAME.

Newly Discovered Evidence.

Even if diligence has been shown in trying to discover evidence, a new trial will not be granted on account of newly discovered evidence which is merely cumulative.

Weight of Evidence.

The court of appeals will only reverse the finding of the lower court on the evidence when it is palpably against the evidence.

APPEAL FROM JESSAMINE CIRCUIT COURT.

April 12, 1879.

OPINION BY JUDGE HINES:

After the expiration of the term at which a judgment is entered the court has no power to vacate or modify it except for the following reasons:

1. Newly discovered evidence, material for the party applying which he could not with reasonable diligence have discovered and produced at the trial.
2. When the party against whom the judgment was rendered was constructively summoned and did not appear to the action.
3. For misprision of the clerk.
4. For fraud practiced by the successful party in obtaining the judgment.
5. For erroneous proceedings against an infant, married woman or person of unsound mind, when the condition of such defendant does not appear in the record, nor the error in the proceedings.
6. For the death of one of the parties before judgment.
7. From unavoidable casualty or misfortune, preventing the party from appearing or defending.
8. For errors in a judgment, shown by an infant within twelve months after arriving at full age.

Secs. 369, 371, 373, and 579, Myers' Civil Code.

The petitions in these cases present only three of these grounds to wit: the first, second and fifth. As to the second ground the party constructively summoned was Samuel Scott. The petition and the record show that he appeared in the former action and made defense in this court. As to the fifth ground relied upon, the fact that Mrs. Nancy E. Estill was a married woman appeared from the face of the record and pleadings in the original action.

It only remains to inquire whether the first ground, that of newly discovered evidence, is tenable. It is doubtful whether the petition alleges or whether the proof shows that the newly discovered evidence might not have been, by the exercise of reasonable diligence produced on the trial of the original action. So far as the \$1,200 certificate is concerned, not only was it in controversy in the first action, and thereby the attention of appellants directed to it, but there is nothing either in the petitions in these cases or in the proof to show that any effort to trace it or to find the correspondence connected with it, was ever made until the time of its discovery. When search was made for the letter it was found in the possession of the party to whom it was addressed, and where one would naturally

presume it to be. But waiving this, and the further consideration that all this evidence is merely cumulative, it appears to us that the judgment should not be disturbed. The issues presented are purely legal issues, questions of fact purely cognizable by a jury, and in such cases it is a well established rule of practice in this court not to disturb the finding of the court below unless it is palpably against the evidence. We should find as a fact, in support of the judgment, everything the evidence strongly conduces to prove. Admitting, then, the sufficiency of the petitions, it appears that the finding of the court below is not so palpably against the weight of evidence as to authorize a reversal.

We think it clear that the depositions of Samuel and Martin Scott were properly excluded. Sec. 25, Chap. 37, General Statutes.

The right of the executrix of W. L. Scott to sue and recover on the note executed to W. L. Scott as executor of Thomas B. Scott cannot now be questioned. The point was made on the first appeal and expressly decided. But whether the point was expressly decided or not is immaterial, for being in issue and all the facts known to the parties as fully as now, that matter is concluded by the decision referred to.

As to the petition in *Thomas B. Scott v. W. L. Scott's Ex'x*, it is sufficient to say that many of the grounds relied upon do not authorize a bill of review under the sections of the code heretofore referred to, and that the modification of the judgment to the extent of \$500 appears to be substantially correct. Conceding that the newly discovered evidence in regard to this matter authorizes the court to entertain the petition, the judgment of the court upon it is not so palpably against the weight of the evidence as to justify a reversal on the cross-appeal of the executrix.

Entertaining these views we deem it unnecessary to notice other minor points made by counsel. Wherefore the judgment of the court below dismissing the petition of *Martin Scott v. W. L. Scott's Ex'x*, as well as the judgment allowing the credit of \$500 in the suit of *Thomas B. Scott v. W. L. Scott's Ex'x*, are affirmed.

Houston & Buckner, for appellants. J. S. Bronough, for appellee.

WORDEN P. HOHN v. H. C. MIDDLETON.

Recovery for Services in Building.

If the owner in violation of his contract failed to erect a house, he is liable for the value of the contractor's services rendered in superintending and advising in its erection as far as it has been erected.

Allegations in Petition.

While a petition for services rendered is defective when it fails to state the value of such services, it is sufficient to support a verdict as it states a cause of action.

APPEAL FROM JEFFERSON COURT OF COMMON PLEAS.

April 12, 1879.

OPINION BY JUDGE COFER:

The appellee undertook to superintend the erection of the porch of the house, and for his services and advice in so doing the appellant bound himself to lease an undivided one-half interest in it to the appellee for five years at an annual rental equal to six per cent. of one-half the agreed value of the ground, and one-half the cost of the building.

If the appellant, in violation of his contract, failed to erect the house, he is liable for the value of the appellee's services rendered in superintending and advising in its erection, as far as it has been erected. And if the house completed would have been worth a rental greater than that the appellee was to have paid, he is liable for that also; but no foundation was laid in the pleadings for anything more than a nominal recovery on that ground.

The allegations in respect to appellee's services we regard as sufficient to support a verdict and judgment for their value. He alleges that he rendered services in superintending the erection of the building, and while the petition was defective in not stating the value of the services, it still presented a cause of action. *Wintersmith v. Tabor*, 5 Bush 105. That no judgment could have been rendered by default for the services does not prove that the petition would have been bad on demurrer, or will not support a verdict. It is better pleading, however, to state the value of services sued for, and the court on motion of the appellant might have required the pleading to be amended by stating the value of the services.

But no recovery beyond nominal damages could be had on the petition as it stands for the failure to complete the house, so that the appellee might enjoy the lease. Whether he has sustained more than nominal damages depends upon the question whether the actual rental value of the one-half of the house would have been greater than the sum the appellee would have been compelled to pay under the terms of the lease. And in order to show a right to re

cover, that the lease would have been worth more than the sum agreed to be paid should have been averred.

No sufficient foundation for a recovery on account of the loss of the ice was laid in the petition. That the appellant promised to complete the house without delay, and suggested and advised the appellee to put up ice, which was lost in consequence of the failure to complete the house as promised, did not make the appellant an insurer of the ice or render him liable for its loss in consequence of a lack of the shelter the house, if completed, would have afforded. If the appellant failed to provide shelter for the ice the appellee should have provided it himself, or have shown that he could not do so.

But the allegations as made do not show that the appellant would be liable even though the ice could not have been saved by proper effort on the part of the appellee. We do not understand the petition as containing an allegation that the appellant made a new promise in connection with his suggestion and advice to put up ice, that he would complete the house without delay. We understand the appellee to refer to the promise made in the contract originally entered into, and this certainly did not authorize him to put up ice, relying on the completion of the house to save it from loss.

All that part of the petition relating to ice should have been stricken out.

Nor does the petition show a right to recover for lost time, as such. But the appellee had undertaken to superintend the erection of the building and was bound to hold himself in readiness to do so at any and all times until advised of appellant's purpose not to complete it, and time lost while waiting to superintend the work whenever the appellant should conclude to go on with it should be taken into the account in estimating the value of his services.

The court erred in its second general instruction in failing to furnish the jury with the criterion of damages.

They should have been told that if they found for the plaintiff they should find the value of the appellee's services in superintending the erection of the building, and that if he was kept idle while waiting for the appellant to go on with the work they should take time so lost into account in estimating the value of his services, unless the work was suspended because it was not reasonably convenient to the appellant to go on with it, in which case no recovery could be had for time lost while the work was suspended.

Wherefore the judgment is reversed and the cause is remanded for a new trial upon principles not inconsistent with this opinion.

Elliott & Atchison, Lane & Harrison, William Lindsay, for appellant.

C. H. Gibson, for appellee.

JOB S. ARNOLD vs. WILLIAM MAIDEN.

Breach of Warranty of Title.

No breach of the covenant of warranty of title can occur until there has been an eviction, and before one can recover on account of such breach he must aver and prove that he has been evicted.

APPEAL FROM OHIO CIRCUIT COURT.

April 17, 1879.

OPINION BY JUDGE PRYOR:

We do not understand that, in a case where the vendee enters under a conveyance either with a general or special warranty of title, a breach occurs until there has been an eviction. The contract or deed may be cancelled upon a proper state of pleading alleging a warranty of title, fraud, etc., on the part of the vendor, but here there is an effort to recover on the covenant of warranty upon the idea that the appellee has been ejected from the premises by reason of a paramount title. The fair construction of the breach alleged is that a third party held a lien on the land for the purchase-money, and a judgment having been rendered to sell, it amounts to an eviction. The answer denies that there has been an eviction, and the mere fact that a lien is about to be enforced is not a breach of the bond or an eviction. The vendor may pay the purchase-money or remove the encumbrance. What the record enforcing the lien may show does not appear, but it is certain that the appellee is still in possession so far as this record shows under the title acquired from the appellant. There is no allegation that the appellee has been evicted from the premises, and before an action can be maintained where there is a warranty of title there must be an eviction.

The judgment is *reversed* and cause remanded with directions to sustain the demurrer to the petition with leave to amend.

Mc Henry & Hill, William Lindsay, for appellants.

Walker & Hubbard, for appellee.

A. J. BEALL v. WILLIAM BETHEL.

Pledge of Property.

Where by the terms of an agreement one has the right to redeem real estate conveyed to secure money loaned to him, the holder of the title, when it is not redeemed, may by a proper pleading have the property sold to pay the money for which it was pledged.

APPEAL FROM HARDIN CIRCUIT COURT.

April 17, 1879.

OPINION BY JUDGE PRYOR:

If by the terms of the agreement between Beall and the appellee he had the right to redeem the houses, or rather if they were merely pledged to the appellee for the purpose of indemnifying him for the money advanced, and there was a tender or offer to redeem, and the appellee refused, an action could be maintained for the property itself.

The appellee only denies the title of the appellant, and does not attempt to rely on the pledge made or ask that he be first paid before the possession is delivered. That he might by a proper pleading have the property sold to pay the money for which it was pledged there can be no doubt.

The bailment is not even pleaded, and there is no attempt to enforce the lien if any exists. As to the issue of fact this court gives no opinion, and can only say that from the plaintiff's proof, if true, he was entitled to recover. The judgment is *reversed* and cause remanded for further proceedings. The appellee should be allowed to amend and enforce his lien in equity if he has any. The question as to whether his purchase was absolute or not is left undetermined.

Wilson & Hobson, for appellant.

JOHN B. BLANKENSHIP v. COMMONWEALTH.**Forfeiture of Bail Bond.**

Where a person accused of crime fails to comply with his bond the court is required to direct the fact to be entered on the record, and thereupon the bail bond is forfeited, and the clerk has no authority, before an order of forfeiture, to dispose of it as required by law in case of forfeiture. There is no right of recovery on such a bond until after forfeiture is ordered.

APPEAL FROM OHIO CRIMINAL COURT.

April 17, 1879.

OPINION BY JUDGE PRYOR:

While an action may be maintained on the bond in the name of the commonwealth, it cannot be properly brought until there is a breach, and the evidence necessary to sustain the breach is found alone in the Code.

Sec. 93, Criminal Code, provides, in substance, that where the accused fails to comply with his bond "the court must direct the fact to be entered on the record, and thereupon the bail bond or the money deposited in lieu of bail is forfeited. The court may have declined to forfeit the bond for reasons not appearing in the record, and the only evidence of the breach is the entry that the accused failed to appear therefore the bond is forfeited. Suppose, in this instance, the accused had deposited the money in lieu of personal security, as he had the right to do, would the clerk be authorized before an order of forfeiture to pass it to the credit of the jury fund or dispose of it, as required by law in case of a forfeiture? We think not, and for the reason that the bond has not been forfeited there is no right of recovery until the forfeiture is ascertained, and this must be entered of record and precede any action, by motion or otherwise, on the part of the commonwealth to recover from the surety or the clerk, if the money in lieu of bail has been deposited with him.

The judgment below is therefore *reversed* with directions to dismiss the petition.

McHenry & Hill, for appellant.

CITY OF BOWLING GREEN *v.* HARMON & ELROD.**Recovering Taxes Paid.**

A payment of taxes illegally assessed will not prevent the recovery of the money back, if paid in ignorance that the law or ordinance under which payment was made was illegal.

APPEAL FROM WARREN COURT OF COMMON PLEAS.

May 8, 1879.

OPINION BY JUDGE PRYOR:

The doctrine has been long established in this state that a payment of taxes illegally assessed will not preclude the party from recovery.

ing the money back, if in ignorance at the time of payment that the law or ordinance under which payment had been made was illegal. *Underwood v. Brockman*, 4 Dana 309; *Ray & Thornton v. Bank of Kentucky*, 3 B. Mon. 510; *City of Covington v. Powell*, 2 Met. 226. A voluntary payment made with a knowledge of the legal rights of the party will prevent such a recovery, and if the claim of the appellees, when tested by this rule, is brought within it, the judgment below was erroneous and should be reversed. That the assessment was illegal must be conceded, and from the facts of this case the conclusion is inevitable that the payment was involuntarily made. The right of the city to collect the taxes had been asserted against the appellees by reason of the assessment made, notwithstanding their protest at the time that their property was not liable to be taxed for city purposes. The latter had certainly denied the rights of the city to include this property within the corporate limits for the purposes of taxation, and was compelled at one time to make payment by reason of an actual levy.

It is to be presumed that Lucas and McNeal were the city collectors and authorized to coerce payment; at least their right to receive the money has not been questioned. The property of the appellees had been assessed. The collector was demanding the taxes, and had no discretion with reference to the issue attempted to be made by the appellees. The latter had certainly denied the right of the city to coerce payment, and permitted at one time this property to be levied on. Those in authority had advised them to pay and await the decision of the court in a similar case where the question would be finally settled. Under some circumstances it cannot be said that the payment was voluntarily made and all remedy withheld, when the imposition of the burden was manifestly illegal.

If the money was not paid in this case under coercion it necessarily follows that the party aggrieved must first require his property to be levied on, and then protest against the illegal demand. The appellees had at all times denied the validity of the assessment. The tax collector was demanding the money, and a refusal to pay would have compelled the officer to make the levy. The payment was made to prevent such coercion, and being clearly illegal, it cannot be said to have been a waiver of the appellees' right to demand the restitution of their money. That portion of the opinion in the case of the *City of Bowling Green v. Gaines*, in which this question is discussed, is so modified as not to require an actual levy on the property or the

warrant of the collector to be in his hands at the time, in order to constitute an involuntary payment.

Judgment affirmed.

B. F. Proctor, J. M. Hines, for appellant.

Halswell & Mitchell, for appellees.

A. L. PARKS *v.* COMMONWEALTH. .

Criminal Procedure—Instructions.

It is within the power of a trial court in a criminal case to give to the jury additional instructions after the argument is begun. It is necessary in a proper case to exercise this power to avoid injustice to the accused, as well as to the commonwealth.

APPEAL FROM LOGAN CIRCUIT COURT.

May 1, 1879.

OPINION BY JUDGE COFER:

But three grounds for a new trial were assigned. This court has no power to inquire into either the first or third. *Terrell v. Commonwealth*, 13 Bush 246; *Kennedy v. Commonwealth*, 14 Bush 340; *Frazier v. Commonwealth*, 12 B. Mon. 369.

The second ground is as follows: "That the court erred to the prejudice of the defendant in giving additional instructions to the jury on motion of plaintiff after the argument had begun, and one of the defendant's counsel had concluded his argument to the jury." Sec. 225 of the code provides that "The court shall on the motion of either party, and before any argument to the jury, instruct the jury on the law applicable to the case, which shall always be given in writing." It will be observed that the objection is not to the form or substance of the instruction, but to the fact that it was given after and not before argument to the jury was commenced.

We cannot think the legislature meant to declare an unbending arbitrary rule, and to forbid the giving of any instruction after argument had commenced. Such a rule would be most inconvenient, and, instead of advancing, would hinder and retard the administration of justice. It is not always possible in the hurry of a trial to see the full scope and bearing of all the facts of a case, and to present with accuracy all the points upon which it may be proper to instruct the jury, and it must often be necessary in order to secure

a correct verdict to give an additional instruction in order to cover some point which escaped the court until the argument is commenced.

Power to correct errors and omissions of the kind indicated must often be necessary to avoid injustice to the prisoner as well as to the Commonwealth. We therefore conclude that all that was intended was that the court shall, before the argument commences, give instructions as far as it then occurs or is suggested to the court that instructions are necessary in order to present the case fully and fairly to the jury, and that when this has been done the court may, in the further progress of the case, give such additional instructions as may seem to be demanded to insure a correct finding by the jury.

We are therefore of the opinion that the court did not err to the prejudice of appellant in giving an additional instruction, the correctness of which is not called in question after the argument had commenced.

Judgment *affirmed*.

Galladay & Frazier, for appellant. Moss, for appellee.

H. K. PUSEY, ET AL., v. MEADE COUNTY.

Suit against a County.

Persons contracting with commissioners appointed to act for the county are bound at their peril to know the extent of their authority to contract.

Action of Levy Court Necessary to Bind County.

The county cannot bind itself for the erection of a bridge except through the action of the levy court, evidenced by orders of record; but such court may render the county liable for extras on such bridge making the structure cost more than the original contract price, by ratifying recommendations for such extras made by its commissioners, and the county thus become liable to pay for such extras.

APPEAL FROM MEADE CIRCUIT COURT.

May 8, 1879.

OPINION BY JUDGE HINES:

No substantial reason is perceived why an action may not be brought against a county *eo nomine*. The provision of the statute that an appeal may be had to the circuit court from the rejection of a claim by the levy court is not exclusive, and has never been so con-

strued by this court. In the case of *Pusey & Somers v. Meade County*, January 25, 1877, this court, by necessary implication, held such a proceeding against the county appropriate. The statutory remedy should be held as cumulative only.

The petition and exhibits show that the original contract between the county and appellants limited the county's liability to \$800, and that for the remainder of the contract price appellants were to look to private subscription. That the commissioners appointed to act for the county had no other authority, by virtue of the order of appointment, is clear. Their agency was limited, and the limitation is conclusively presumed to have been known to appellants. It may also be conceded that the county cannot bind itself in such cases except through the action of the levy court, evidenced by orders on record. The court below sustained a demurrer to the petition, and evidently upon the idea that it set forth no such enforceable contract.

The facts are that the commissioners, who under direction of the court closed the contract for the erection of the bridge, finding that if completed according to the specifications it would be comparatively worthless, by written direction to appellants caused material alterations to be made. On the completion of the bridge according to the directions the commissioners reported in writing to the levy court the alterations made at their suggestion, the necessity for making them, and recommended that appellants should be paid for this extra outlay. This report was approved in general terms by the court with directions to pay the \$800, original contract price, the bridge received by the court, but nothing said in the order as to pay for the extra work done under the directions of the commissioners.

On the refusal of the court to pay for this work any further sum than the \$800, this action was brought against the county, demurrer sustained to the petition, and an appeal to this court. The approval of the report was not partial, but of all its facts, and amounted to an express ratification of all that had been done by the commissioners, and is as binding upon the court as if the alterations in the original plan had been previously directed by order of court. It cannot be questioned that a specific order of the court for these alterations at a completion in compliance with such order would have rendered the county liable for the value of such improvements or alterations. The original contract stands upon its own terms, but the extra work done under directions of the commissioners, approved and accepted by the court, constitutes a new contract upon which the county

liable in the same way and to the extent as it would have been if there had been no other contract between the county and the contractors. It is not essential that the price should have been agreed upon prior to the doing of the work or at any other time. The county is liable for its value, and upon this an issue should have been found and submitted to the jury. The impracticability of enforcing a personal judgment against the county necessarily arises here. If it should be determined that the extra work has been done, and that the county is liable therefor, it will then be time enough for appellants to determine upon a method for enforcing payment.

Wherefore the judgment is *reversed*, and cause remanded with directions to overrule the demurrer to the petition and for further proceedings consistent with this opinion.

W. H. Chelf, James Montgomery, for appellants.

Lewis & Fairleigh, for appellee.

JERRY MACKEY, ET AL., v. E. B. OWSLEY, ET AL.

Validity of City Ordinance.

An ordinance to be valid must be published as required by charter, and where one's relief depends on an ordinance he must allege in his petition that the ordinance was so published.

When Debt Becomes Due.

The price of digging a well is due when the well is completed and the work accepted by the proper authority, and the guaranty that it will produce a certain amount of water for one year does not have the effect to postpone payment until the end of such year.

APPEAL FROM LOUISVILLE CHANCERY COURT.

May 13, 1879.

OPINION BY JUDGE COFER:

We incline to the opinion that the price of digging wells is due when the work is received by the proper authority, and an apportionment is made and warrants issued, unless a different time of payment is agreed upon. The ordinance seems to contemplate that the work shall be received when completed, and the provision that the well shall continue for the space of one year from the time it is received, to furnish five feet of water, was not intended to postpone the time of payment, but to render the contractor liable on his bond

for the cost of making the well, when under his contract and the ordinance it was his duty to make it. Neither the charter nor ordinances nor contract in terms fix the time of payment, and consequently the time of performance on one side is the presumed time for performance on the other. When the well is received, and not till then, the one year during which the contractor guarantees its sufficiency begins to run, and as he is bound upon his bond to make good that guaranty, there seems to be no sufficient reason to postpone payment.

But the petition was fatally defective in failing to allege that the ordinance was published as required by charter.

Wherefore the judgment is *affirmed*.

Lane & Harrison, for appellants.

Young & Boyle, for appellees.

HALE & HEAD, ET AL., v. J. A. GROGAN, ET AL.

Attachments, When May Be Issued.

An attachment can only be issued at the time or after the commencement of an action, and an action is commenced by filing the petition in the clerk's office and causing a summons to be issued or a warning order made. An attachment is void where no summons has issued, and this question can be raised by another creditor.

APPEAL FROM CALLOWAY CIRCUIT COURT.

May 13, 1879.

OPINION BY JUDGE PRYOR:

The question raised in this case is, Can an attachment issue before the summons? We see no escape from the conclusion reached by the court below.

The plaintiff may, at or after the commencement of an action, have an attachment, and not before. An action is commenced by filing in the clerk's office the petition and causing a summons to be issued or a warning order made. Secs. 39-194, Civil Code. There is no *lis pendens* until a summons is issued or a warning order made, and the provisions of the General Statutes are not in conflict with this view of the case, and if such was the case the provisions of the Code of Practice must control.

The various actions in which attachments had been obtained were consolidated and the question presented as to the rights of the

creditors. Each creditor was directly interested in having the property or its proceeds applied to the payment of his debt and we perceive no reason why in such a case one creditor should not be allowed to contest the right of priority on the part of other creditors, and to show that they have in fact no lien on the property sold. The attachment of the appellants was void, as no summons had issued.

The judgment below is therefore *affirmed*.

G. A. C. Holt, William Lindsay, for appellants.

E. Crossland, for appellees.

WILLIAM BANKS v. COMMONWEALTH.

Criminal Law—Instruction.

It is not proper in any case for the court to instruct the jury that the law implies malice from any fact or facts proven.

Malice an Ingredient in Crime.

Where malice is an essential ingredient in a crime the jury should be left to find that it exists or does not exist, the same as it is left to them to find the killing in a homicide case.

No Reversal Where Instruction Is Not Prejudicial to Defendant.

Before an erroneous instruction can be made the sole ground of reversal it must appear that it is at least probable that the accused may have been prejudiced by it.

Proof Affecting Credibility Only.

Proof that a witness made statements when not on oath inconsistent with his sworn testimony is not substantive evidence as to the circumstances of the killing in a homicide case, but goes only to show his credibility as a witness.

APPEAL FROM MENIFEE CIRCUIT COURT.

May 13, 1879.

OPINION BY JUDGE HINES:

The second instruction given in this case is neither accurate in language nor correct as a matter of law. While not necessarily in conflict with the conclusions reached in the case of *Farris v. Commonwealth*, 14 Bush 362, it is inconsistent with the reasoning there employed, which we recognize to be correct. The same instruction in instance was approved without comment in *Kriel v. Commonwealth*, 5 Bush 362; and in *Nichols v. Commonwealth*, 11 Bush 575,

it was also proved, apparently upon the idea that it could not, reason of an instruction in regard to manslaughter, have misled the jury to the prejudice of appellant. The grounds upon which opinion in the Farris case was based do not appear to have been suggested or considered by the court in the Nichols case. The instruction condemned in the Farris case was clearly misleading and prejudicial.

While there are cases in which such an instruction will be allowed to stand because the error committed in granting it is cured or counteracted by other instructions, it is not proper in any case to tell the jury that the law implies malice from any fact or fact proven. Malice, being an essential ingredient in the crime, should be left to be found by the jury, as they are left to find the facts of the killing. It is a matter exclusively within the province of the jury. But it is not every erroneous instruction that will authorize the court to reverse. It ought to appear, before such an instruction is made the sole ground for reversal, that it is at least probable that the prisoner may have been prejudiced by it.

We affirmed the case of *Frazier v. Commonwealth*, 12 B. M. 369, in which the instruction denounced in the Farris case was given because it did not appear probable that the accused had been prejudiced by the erroneous instruction. There are two instances in which this court should not reverse for an erroneous instruction, such as the one complained of here: 1. When there is no evidence from which the jury could conclude that the offense committed was manslaughter, or that the killing was done in self-defense; 2. When the instructions as to manslaughter and self-defense are given in such a manner as to render it manifest that the erroneous instruction in regard to malice could not have misled the jury to the prejudice of the accused.

In the case under consideration the absence of substantive evidence that the killing was done in self-defense, or that it was done in sudden heat of passion, taken in connection with the facts of the whole law of self-defense and of manslaughter was prominently and clearly presented to the jury, renders this otherwise objectionable instruction unobnoxious. The testimony of Hazelrigg, the only witness to the killing, which from his statements appears to have been deliberate, premeditated and unprovoked, is supported by a fact consistent with all the other facts and circumstances proven in the case. Proof that the witness made other statements, when not

inconsistent with his sworn testimony, is not substantive evidence as to the circumstances of the killing, but goes only to his ability.

The instruction as to the affidavit of Hazelrigg appears to be substantially correct, and not prejudicial to the substantial rights of the appellant.

We perceive no substantial error in giving or refusing instructions. Therefore the judgment is *affirmed*.

H. Holt, for appellant. Stone & Moss, for appellee.

JAMES B. SLEODD v. W. H. JESSIE.

Instruction for Slander.

The plaintiff in an action of slander cannot by averment enlarge the meaning or change the sense of the language actually used by the defendant.

Instruction in Slander.

To constitute slander the words, if spoken, must have been spoken with a malicious purpose, and while the mere utterance may be prima facie evidence of malice, still the presumption of malice may be rebutted, and hence is not to be conclusively presumed from the speaking of the words.

Instruction as to Malice.

The question of malice is with the jury and not the court, and an instruction that malice is implied from certain proven facts is erroneous.

APPEAL FROM SHELBY CIRCUIT COURT.

May 22, 1879.

OPINION BY JUDGE PRYOR:

The plaintiff in an action of slander cannot by an averment enlarge the meaning or change the sense of the language actually used by the party charged. Hence, in the cases of *Porter v. Hughey*, 232, and *Brown v. Piner*, 6 Bush 518, it was held that the facts used did not amount to a charge of any criminal act, and the instruction would not be allowed to affect their meaning as generally understood. In this case, however, there is something more charged than a mere trespass. The words "and you took my heifer from me. If I wanted my heifer I would go to your butcher shop,

it was also proved, apparently upon the idea that it could not, by reason of an instruction in regard to manslaughter, have misled the jury to the prejudice of appellant. The grounds upon which the opinion in the Farris case was based do not appear to have been suggested or considered by the court in the Nichols case. The instruction condemned in the Farris case was clearly misleading and prejudicial.

While there are cases in which such an instruction will be allowed to stand because the error committed in granting it is cured or counteracted by other instructions, it is not proper in any case to tell the jury that the law implies malice from any fact or facts proven. Malice, being an essential ingredient in the crime, should be left to be found by the jury, as they are left to find the fact of killing. It is a matter exclusively within the province of the jury. But it is not every erroneous instruction that will authorize this court to reverse. It ought to appear, before such an instruction is made the sole ground for reversal, that it is at least probable that the prisoner may have been prejudiced by it.

We affirmed the case of *Frazier v. Commonwealth*, 12 B. Mon. 369, in which the instruction denounced in the Farris case was given because it did not appear probable that the accused had been prejudiced by the erroneous instruction. There are two instances in which this court should not reverse for an erroneous instruction such as the one complained of here: 1. When there is no evidence from which the jury could conclude that the offense committed was manslaughter, or that the killing was done in self-defense; 2. When the instructions as to manslaughter and self-defense are given in such a manner as to render it manifest that the erroneous instruction in regard to malice could not have misled the jury to the prejudice of the accused.

In the case under consideration the absence of substantive evidence that the killing was done in self-defense, or that it was done in sudden heat of passion, taken in connection with the fact that the whole law of self-defense and of manslaughter was prominently and clearly presented to the jury, renders this otherwise objectionable instruction unobnoxious. The testimony of Hazelrigg, the only witness to the killing, which from his statements appears to have been deliberate, premeditated and unprovoked, is supported by and consistent with all the other facts and circumstances proven in the case. Proof that the witness made other statements, when not on

oath, inconsistent with his sworn testimony, is not substantive evidence as to the circumstances of the killing, but goes only to his credibility.

The instruction as to the affidavit of Hazelrigg appears to be substantially correct, and not prejudicial to the substantial rights of the appellant.

We perceive no substantial error in giving or refusing instructions. Wherefore the judgment is *affirmed*.

W. H. Holt, for appellant. Stone & Moss, for appellee.

JAMES B. SLEODD v. W. H. JESSIE.

Petition for Slander.

The plaintiff in an action of slander cannot by averment enlarge the meaning or change the sense of the language actually used by the defendant.

Malice in Slander.

To constitute slander the words, if spoken, must have been spoken with a malicious purpose, and while the mere utterance may be prima facie evidence of malice, still the presumption of malice may be rebutted, and hence is not to be conclusively presumed from the speaking of the words.

Instruction as to Malice.

The question of malice is with the jury and not the court, and an instruction that malice is implied from certain proven facts is erroneous.

APPEAL FROM SHELBY CIRCUIT COURT.

May 22, 1879.

OPINION BY JUDGE PRYOR:

The plaintiff in an action of slander cannot by an averment enlarge the meaning or change the sense of the language actually used by the party charged. Hence, in the cases of *Porter v. Hughey*, 2 Bibb 232, and *Brown v. Piner*, 6 Bush 518, it was held that the words used did not amount to a charge of any criminal act, and the innuendo would not be allowed to affect their meaning as generally understood. In this case, however, there is something more charged than a mere trespass. The words "and you took my heifer from Price. If I wanted my heifer I would go to your butcher shop,

of the *res gestæ*. These declarations were a mere narrative of a then past event, and were incompetent. Wharton on Evidence, Sec. 261; 1 Greenl., Sec. 110.

Nor was it competent to prove either the declarations made or the appearance of alarm exhibited by the appellant when a threat of the deceased was communicated to him. The fact that the threat was made and communicated was proved, and the jury were to decide how far the threat was calculated to create in the appellant a reasonable apprehension of danger, when he subsequently met the deceased. He was not to be tried by his fears, but by the reasonableness of his apprehensions.

That the deceased repeatedly threatened the appellant's life and once attacked him with rocks was proved, but the altercation between them on the occasion of the trial of the peace warrant, and the threat then made to whip the appellant, and the fact that deceased took hold of a chair and tried to strike him, were not allowed to be proved.

In view of the overwhelming evidence already before the jury that the deceased had threatened the life of the accused, the substantial rights of the appellant cannot have been prejudiced by the refusal to allow that altercation to be proved. We cannot say that there was an abuse of discretion in refusing to allow the witness, Jackson, to state when recalled whether appellant was near enough to the deceased to hear the threat proved by that witness. The threat had already been proved, and it was also proved that it had been communicated to the appellant, and it was not important whether he heard it from the lips of the deceased or not.

Wherefore, perceiving no error to the prejudice of the substantial rights of the appellant, the judgment is *affirmed*.

Deming & Owens, A. Duvall, for appellant. Moss, for appellee.

KENTUCKY MASONIC MUTUAL LIFE INS. CO. *v.* FANNIE C. GATES.

Life Insurance Conveyed by Will.

Where the charter of the Kentucky Masonic Mutual Life Insurance Company provides what disposition is to be made of the fund due from the corporation on account of membership, such provision governs in preference to the will of the member, and the widow cannot recover from the company for more than the share provided for widows, notwithstanding that the terms of her husband's will gave her a larger share.

APPEAL FROM BARREN CIRCUIT COURT.

May 30, 1879.

OPINION BY JUDGE COFER :

The only power a member of appellant corporation, having a wife and children, has to regulate by his will the disposition to be made of the fund due from the corporation, on account of his membership, is to direct that it shall be appropriated equally between his wife and children. This is the express provision of the charter, which must control in preference to the will of the member. *Kentucky Masonic Mut. Life Ins. Co. v. Miller's Adm'r*, 13 Bush 489.

It results, therefore, that the court erred in rendering judgment against the company in favor of the widow for more than the share to which she is entitled under the provisions of the charter. The charter does not provide in terms what share the widow shall be entitled to. But the provision empowering the member to direct by will that the fund shall be appropriated for the benefit, equally, of his widow and children, is sufficient to show that when there are no such directions in his will that the money is not to be divided equally between them, and we incline to the opinion that the intention was that it should be divided according to the law of distribution, the widow taking one-third and the children two-thirds.

Wherefore the judgment is *reversed* and the cause remanded with directions to render judgment in favor of the appellee for one-third of the amount due on the certificate of membership.

John M. Porter, for appellant.

Lewis & Porter, for appellee.

ELIJAH WATTS v. HENRY ROGERS, ET AL.**Damages Recovered for Fright.**

Where masked persons, having threatened injury to another, approach his residence in the night time, making a loud noise, such as was calculated to alarm such person and his family and keep them awake, and to produce in their minds a reasonable apprehension that something more than frightening of the family was intended, such person may recover damages for such trespass, and this is true whether the mob remains in the highway or enters upon his premises.

APPEAL FROM FRANKLIN CIRCUIT COURT.

May 31, 1879.

OPINION BY JUDGE PRYOR:

The act of going masked was itself unlawful, and the appellant having received the threatening letter, with evidence conducing to show that it was in the handwriting of one of the appellees, or at least the direction upon it was calculated to alarm the appellant and his family, or if not to cause them to anticipate trouble. When the parties, after the reception of the letter, appeared in disguise, the danger was certainly impending, and the loud noise and constant riding at and near appellant's house until a late hour of the night not only kept his family from sleeping, but produced a reasonable apprehension that something more than the mere frightening of the family was intended. Now, can one threaten another, and with a view of carrying out his designs approach the house of the party threatened, in disguise, alarm and intimidate his family, and no remedy be given? We think not. If such facts appear, and the peace and quiet of a man and his family are disturbed by the appearance of the party who intends the wrong, it is as much a trespass as if he had entered on his premises. The claim for damages may not be so great, but one has no right to approach the house of another for the purpose of alarming him or his family, and when the act is done, say he is not liable because there was no actual entry on the premises. The extent of the injury the jury must determine, if the facts authorize such a finding.

There was enough in appellant's case to leave the question with the jury, and a nonsuit should not have been ordered, nor a verdict for the defendants. If they made their appearance in the highroad opposite the house of appellant in disguise for the purpose of frightening him or his family, and such was the effect of their actions, it was a trespass for which the appellees are liable in damages; or if they made their visits for the purpose of inflicting on the appellant personal chastisement, and the effect was to alarm and frighten him and his family, or either, it is a trespass to the person.

The judgment is therefore *reversed* and cause remanded for further proceedings.

T. B. Ford, for appellant. Ira Julian, for appellees.

SARAH ANN JONES, ET AL. v. NANCY STEWART.

Warrantor Estopped.

A covenantor is generally estopped from setting up an after-acquired title against his grantee or those claiming under him.

Avoiding Estoppel.

The grantor warranting title is estopped from setting up an after-acquired title, but may avoid the estoppel by showing that since the execution of his covenant of warranty he has reacquired from his grantee the identical title he conveyed to him. This he may do through a conveyance, or by any other legal mode of acquiring the title, as by fifteen years' continuous adverse possession.

APPEAL FROM CALLOWAY CIRCUIT COURT.

June 5, 1879.

OPINION BY JUDGE COFER :

This action was at law, and was heard and decided by the court, neither party having demanded a jury. The evidence, when viewed most favorably for the appellants, was conflicting and fully warranted, if it did not require, the court to find that the appellee, and those under whom she claimed, had been in the actual occupancy of that part of the land which is enclosed for at least fifteen years before the suit was commenced, claiming it as their own.

That part not enclosed was not defined in the petition nor in the evidence, so as to enable the court to render judgment in appellants' favor even if the evidence warranted it. The judgment must therefore, be affirmed, unless, as appellants' counsel contend, the plea of the statute is unavailing.

We apprehend that the fact that Stewart, under whom the appellee claims, conveyed the land to Jones, under whom the appellants claim, cannot affect the decision of the question. That a covenant of warranty will sometimes, or even generally, estop the covenantor from setting up an after-acquired title against his grantee or those claiming under him is certainly true. *Smith v. Mahan*, 7 T. B. Mon. 228.

But the grantor may avoid the estoppel by showing that since the execution of his covenant he has re-acquired from his grantee the identical title he conveyed to him. This he may do either through a conveyance or by any other legal mode of acquiring the title, as by fifteen years continuous adverse possession. Such possession by Stewart tolled Jones' right of entry and vested it in Stewart, just as though Jones had derived the title from a third person.

If it were conceded, which we do not mean to do, that a vendor, who continues in possession of land after he has conveyed it to his vendee, holds in trust, the trust is still only implied, and will be barred by fifteen years of holding by the grantor under claim of

title, and especially so when he so holds with the knowledge of the grantee.

In any aspect of the case we think the statute presented a complete defense, and the judgment must be *affirmed*.

W. L. Weathers, for appellants. L. Anderson, for appellee.

ROBERT JANNINGS *v.* COMMONWEALTH.

Criminal Law—Malice.

An instruction by the court in a murder trial that malice is implied by the law from certain proven facts is erroneous; the jury should be left to determine whether there was malice from all the facts and circumstances proven.

No Reversal for Error Not to the Prejudice of the Accused.

This court will not reverse a criminal case for an erroneous instruction which, when taken in connection with other instructions, did not prejudice the substantial rights of the defendant.

APPEAL FROM FAYETTE CIRCUIT COURT.

June 3, 1879.

OPINION BY JUDGE HINES:

Appellant was indicted for the murder of O'Connor, convicted of manslaughter, and sentenced to the penitentiary for fifteen years. The only witness to the killing was the wife of the deceased. From her statement it appears that there had been no previous difficulty or ill-feeling between the appellant and the deceased, that the deceased was unarmed, and made no effort or demonstration to assault appellant.

Among the grounds for reversal urged by counsel for appellant is the action of the court below in excluding the testimony of James L. Neal. The witness stated that he knew appellant well, lived in the same neighborhood. He was then asked if he knew the general character of the accused in that neighborhood, for peace and good order, or for the reverse, to which he replied that he knew him well and had never heard anything against him. The court then asked the witness if he knew the general reputation or character of the accused in the neighborhood in which he lived, and the estimate in which he was held by his neighbors, to which the witness replied that he could not answer otherwise than he had answered.

Other uncontradicted evidence had been received to the effect that the accused was a man of quiet and inoffensive disposition.

Conceding that he possesses the best character or reputation, in reference to whom the least has been said, or whose character has been the least discussed, and that the answer of the witness was competent, it does not follow that its exclusion is a reversible error. It ought to appear to the court, before a reversal is granted, that there is at least a probability that the accused was prejudiced by the exclusion of the evidence. A mere possibility that such may have been the case is not sufficient.

The instruction in regard to malice is incorrect. We have repeatedly said that the court should never tell the jury that the law implies malice from any fact or facts proven. Its existence or non-existence is purely a question for the jury. But it should appear, before such an instruction is made the sole ground for reversal, that it is at least probable that the prisoner may have been prejudiced thereby. We affirmed the case of *Frazier v. Commonwealth*, 12 B. Mon. 369, in which the instruction denounced in the case of *Farris v. Commonwealth*, 14 Bush 362, was given, because it did not appear probable that the accused had been prejudiced by the erroneous instruction.

There are two instances in which this court should not reverse for an erroneous instruction such as the one complained of here: First, where there is no evidence from which the jury could conclude that the offense committed was manslaughter, or that the killing was done in self-defense; second, when the instructions as to manslaughter and self-defense are given in such a manner as to render it manifest that the erroneous instruction in regard to the malice could not have misled the jury to the prejudice of the accused. In the case under consideration the absence of substantive evidence that the killing was done in self-defense, or that it was done in sudden heat of passion, taken in connection with the fact that the whole law of self-defense and manslaughter was prominently and clearly presented to the jury, renders this otherwise objectionable instruction innoxious.

The facts of this case did not require that the law of involuntary manslaughter should be submitted to the jury.

Wherefore the judgment is affirmed.

W. C. P. Breckinridge, Alford & Smith, for appellant.

Moss, for appellee.

G. D. WILSON v. COMMONWEALTH.

Criminal Law—Gaming.

It is not required that money should be won or lost to make the offense of setting up or permitting to be set up a faro-bank, gaming table, machine or contrivance used in betting. It is sufficient that money may be won or lost, and the fact that it has not yet been won or lost will not protect the owner or keeper from being punished for setting up the place.

APPEAL FROM FAYETTE CIRCUIT COURT.

June 3, 1879.

OPINION BY JUDGE HINES:

The sixth and seventh sections of Chapter 47 of General Statutes denounce penalties against one setting up, or permitting to be set up, any faro bank, gaming table, machine or contrivance used in betting, or other game of chance, whereby money or other thing is or may be won or lost. It is not required that money should be won or lost to make the offense complete. It is sufficient that money "may be won or lost." Such is the case, at least so far as setting up a faro bank is concerned, which is specifically denounced by the statute as a contrivance for betting and gambling amounts substantially to an averment that money may be won and lost on the game. Under the letter of the statute a faro bank cannot be set up for any purpose without incurring the penalty denounced by the statute. The legislature, having the unquestioned right to so provide the hardships that may result, or the unreasonableness of the law, cannot alter the judicial interpretation. *Commonwealth v. Monarch*, 6 Bush 298.

The first instruction given by the court is substantially correct. The jury are told that if they believe beyond a reasonable doubt that the accused permitted the faro bank to be set up, and if they "are satisfied from the proof" that the room was in his possession or under his control, they must find him guilty. To be satisfied from the proof has been held to be equivalent to the expression "believe from the evidence beyond a reasonable doubt." *Brown v. Commonwealth*, 14 Bush 398.

We are of the opinion that the portion of the statute that declares "after proof of setting up, it shall be presumed to have been with the permission of the person occupying or controlling the same, unless the contrary be clearly proved," is not unconstitutional. The

8th section of the Bill of Rights applies to such offenses as were indictable felonies at common law, felonies by statute, and such statutory offenses as infamous punishments are provided for. It does not apply to statutory offenses punishable by fine. Proffitt on Jury Trials, Sec. 97. *Commonwealth v. Avery*, 14 Bush 625.

There was no error in rejecting the paper purporting to be a contract of lease.

Judgment affirmed.

Morton & Parker, for appellant. Moss, for appellee.

FREEMAN FARRIS v. COMMONWEALTH.

Criminal Law—Homicide.

Malice is not an implication of law, but a matter of fact to be determined in a homicide case by the jury, as any other element in the crime of murder, and it is not required that the court should single it out from the other facts, and in an instruction give undue prominence to it.

APPEAL FROM BOYLE CIRCUIT COURT.

June 3, 1879.

OPINION BY JUDGE HINES:

We are unable to discover any substantial error in the record. The instructions present the law of murder and manslaughter in so clear a manner that the jury, in our opinion, could not have been misled. When this was done it was the province of the jury alone to determine whether the offense was that of murder or of manslaughter. The court did not err in refusing to instruct the jury that "malice must be proven as any other fact." As we said in the opinion on the former appeal (14 Bush 362), the existence of malice must be determined by the jury as they determine any other fact, but it was not intimated that it should be singled out from the other facts and given undue prominence, as would have been the case if this instruction had been granted. The leading idea in that opinion is that "malice" is not an implication of law, but a matter of fact to be determined by the jury as any other element in the crime of murder. We are of the opinion, however, that the court did well in refusing to define the meaning of the term to the jury. The popular and the legal meaning of the term is so nearly the same that a

definition would probably confuse rather than enlighten the jury. It will ultimately be found necessary, as has been the case with the term "reasonable doubt," to leave its meaning to be arrived at by the jury, unembarrassed by metaphysical definitions, which are, from the necessity of the case, more or less misleading. The attempt to define terms that the ordinary intelligence may reasonably be presumed to comprehend more often confuses than enlightens.

Judgment affirmed.

G. W. Dunlap, W. D. Hopper, L. F. Hubble, for appellant.

Moss, for appellee.

MACK MAUPIN *v.* COMMONWEALTH.

Continuance in Criminal Case.

The court, on a proper application of a defendant in a criminal case, should continue the cause where an important witness for the defense is absent without the fault of the defendant, and whose presence may be secured at a later date, especially where the defendant has been diligent in his efforts to have such witness present at the trial.

APPEAL FROM MADISON CIRCUIT COURT.

June 5, 1879.

OPINION BY JUDGE HINES:

The court erred in refusing to continue the case on account of the absence of the witness, George Thacker. The affidavit for continuance is in substantial compliance with the requirements of the Code, and if the facts that it is stated could be established by the absent witness, should be found by the jury, a strong case of self-defense would be made out. The witness was before the court on subpoena the day preceding the application for continuance. The record does not show that appellant neglected to use any legal means in his power to secure the attendance of the witness. The fact of the service of subpoena on him in the county, and his attendance in obedience thereto, is sufficient to show that his appearance might be obtained at the succeeding term.

The instruction telling the jury that the law implies malice from certain facts is erroneous. The existence of malice must be established, as any other fact, by evidence, and to the satisfaction of the jury. The law implies no fact necessary to make out the guilt of

the accused, and it is, therefore, erroneous in any case to so instruct the jury. *Farris v. Commonwealth*, 14 Bush 362; *Buckner v. Commonwealth*, 14 Bush 601.

It is the safer course, in every case of homicide, to leave the meaning of the term "malice" and "malice aforethought" to be determined by the jury without the embarrassment that would probably result from an attempt to define these terms. Experience has demonstrated the wisdom of this course in reference to the term "reasonable doubt," as it will ultimately do as to the terms "malice" and "malice aforethought."

Judgment *reversed* and cause remanded with directions to grant a new trial and for further proceedings consistent with this opinion.

Smith & Little, C. F. Burnam, for appellant. Moss, for appellee.

G. W. JENKIN'S EX'R v. J. H. BROWN.

Award of Arbitrators.

After an award is made and signed by the arbitrators, it cannot be altered or amended without notice to the party affected by the amendment.

Power of Court to Correct Mistake in Award.

The court has the power upon proper pleadings being filed to correct a mistake in an award made by arbitrators when it is shown such mistake has been made.

Suit on Dispute After Award Made.

No action can be maintained on the original cause of dispute after submission and award made thereon, without the award being successfully assailed.

APPEAL FROM NELSON CIRCUIT COURT.

June 17, 1879.

OPINION BY JUDGE HARGIS:

Both parties admit the arbitration and award. There is no pleading in the case showing any grounds for setting aside the award, nor does either party ask this to be done, or dispute that it was fairly made.

The only question affecting the award in any degree is raised by the averment in appellant's pleadings that the arbitrators, by an erroneous calculation, gave the appellant only one-half of the sum

which should have been awarded to him. But this does not appear on the face of the award. That alleged error was sought to be cured by an amendment of the award after it was made and signed by the arbitrators, without notice to the appellee. This was not legal because of the absence of notice and the cessation of the powers of the arbitrators. The court had the power, with proper pleadings, to correct the mistake if any had been made. *Baker's Heirs v. Crockett*, Hardin 388.

But the appellant, having brought his suit in two paragraphs, in the first suing on the award, and in the second on the account and promise to pay it, on motion of the appellee, the court ordered him to elect which cause of action he would prosecute, and without objection or exception he elected to sue on the account set up in the second paragraph and the first was dismissed without prejudice.

The appellee then pleaded the award in bar, which should have been sustained, for no action can be maintained on the original cause of dispute after submission and award thereon without the award being successfully assailed. *Evans v. M'Kinsey*, Litt. Selected Cases, 264; *Logsdon v. Roberts*, 3 Mon. 255; *Tevis' Ex'r v. Tevis' Ex'rs*, 4 Mon. 47.

But the court erred in rendering judgment for \$38.09 in favor of appellee on his counterclaim, because the submission and award was final, as no legal reason was shown to set them aside; and appellant should not have been charged with uncollected rents, because there is neither pleadings nor consideration shown sufficient to sustain a promise by appellant's testator to pay the rents, even if the award were not final, and the testimony established the promise, for it was as much the duty of appellee as of the appellant to rent the partnership property.

There was no error in excluding appellee's deposition because he testified to matters about which he was not competent to testify, and concerning the matters about which he was competent he failed to say anything.

Wherefore the judgment is *reversed* with directions to dismiss appellant's action without prejudice, and to dismiss appellee's counterclaim also without prejudice.

Muir & Wickliffe, for appellant.

John A. Fulton, for appellee.

SILAS WILCOX v. COMMONWEALTH.

Criminal Law—Homicide.

Where two persons are jointly indicted for murder, after one in a separate trial has been found guilty of manslaughter he is a competent witness for the commonwealth in the trial of the other, and this is true whether the witness has been sentenced or not.

Accessories in Crime.

There are but two classes of accessories in crime, before the fact and after the fact, but there is no such thing known to the law as an accessory at the fact.

APPEAL FROM CHRISTIAN CIRCUIT COURT.

June 26, 1879.

OPINION BY JUDGE COFER:

The appellant and George Garrett and Albert Burnett were jointly indicted for the murder of Alfred Lacy. They demanded separate trials. Garrett was first tried and found guilty of manslaughter. The appellant was then put upon trial, and the commonwealth (sentence not having been pronounced) offered Garrett as a witness against him. Appellant's counsel objected to him as a witness on the ground that he was a co-defendant. The court overruled the objection, and whether that ruling was correct is the first inquiry.

At the common law no party to the record, in either civil or criminal proceedings, was a competent witness either for himself or for another party. And such continued to be the rule in this state in criminal causes until the adoption of the present Criminal Code. *Edgerton v. Commonwealth*, 7 Bush 142; *Thompson v. Commonwealth*, 1 Met. 13.

Secs. 2, 3 and 4, of the Code provides that, "If two or more persons be jointly indicted for the same offense each shall be a competent witness for the others, unless the indictment charge a conspiracy between them." Whether this is merely intended to change the rule when one co-defendant is called as a witness on behalf of another, and leaves it unchanged when the witness is called by the commonwealth, we need not now decide.

But the common-law rule which excluded parties to the record from the witness stand was based upon the ground that, being interested in the result of the trial, they could not be safely relied upon to testify truly, and it would seem that when a party has been tried, and

in consequence ceases to have any further interest in the matter, when whatever his testimony may be it cannot affect his own case, the rule of exclusion based upon his interest ought to cease. Where two persons were jointly indicted, and one had been convicted, the judgment of conviction not rendering him incompetent as a witness generally, it was held that he was a competent witness against the other defendant. *I Greenleaf on Evidence*, Sec. 363.

The uniform tendency of modern legislation and adjudication has been to enlarge the sphere of the competency of witnesses to let all testify who have intelligence enough to state such facts as they may know, or profess to know, and to leave the jury to give to the statement such weight as in view of all the circumstances they may think it entitled to.

Garrett had been found guilty. Neither the acquittal nor conviction of the appellant could affect his interest in any way, and there was therefore no reason why he should not be permitted to testify.

The indictment charges that the defendants did "feloniously and with malice aforethought kill and murder Alfred Lacy in the following manner; they pursued the said Alfred Lacy, Silas Wilcox caught him and held him, and at that time Albert Burnett knocked down the said Alfred Lacy with a piece of wood, and when the said Alfred Lacy had been thus knocked down the defendant, George Garrett, alias George Williams, stamped upon the body of said Alfred Lacy, and thereby killed him," etc.

The appellant moved to arrest the judgment. The motion was overruled, and counsel urged several objections to that ruling: 1. That it was impossible to ascertain from the indictment whether the appellant is proceeded against as principal or as accessory, or both; 2. That if the indictment is good as an indictment for murder, it charges the appellant, in the same count with murder and with being accessory to the murder, and that without setting out the principal in proper terms and with technical accuracy; 3. That the acts charged to have been done by the appellant do not constitute an offense, certainly not a felony to "catch and hold him", the deceased; 4. That there is an attempt to charge appellant in the same count as guilty of murder, and also as being present, aiding and assisting himself in the commission of the offense, which is a legal impossibility. 5. That there is no allegation that appellant did the killing, but on the contrary it is stated that Garrett killed the deceased, and

there is no charge that appellant had any knowledge of Garrett's murderous intention.

There is in the indictment an unnecessary detail in the statement of the acts done by each of the defendants. It would have been sufficient to charge that the defendants killed the deceased by knocking him down and stamping upon him with their feet, without stating the separate part performed by each.

If this had been done, then what each did might have been proved, and if the appellant caught and held the deceased while Burnett knocked him down, and while Garrett stamped upon him, for the purpose of aiding in inflicting injuries upon him, then the appellant is as much answerable for the blows as those who actually gave them. The indictment charged that all the defendants were present, and that they feloniously and with malice aforethought did kill and murder the deceased, and then proceeds to state how they did it, but instead of charging, as might well have been done, that all did each of the acts done by any one of them, charges what acts each did. This did not, however, alter the legal effect of the indictment. If they were all present, and all acted feloniously and with malice aforethought, then, though the separate acts of each are stated, the law makes the act of each the act of all, and the indictment is good against all.

The facts stated in the indictment do not show that the appellant was an accessory. There are but two classes of accessories, accessories before the fact and accessories after the fact. There is now no such thing known to the law as an accessory at the fact. All persons who are present at the commission of the fact and aid or abet its commission are principals, either in the first or second degree. Wharton on Homicide, Sec. 333.

It is objected to instruction No. 2, given to the jury, that the court told them that if Lacy came to his death in consequence of injuries inflicted upon him by Burnett and Garrett by striking him and stamping upon him "substantially as set forth in the indictment", and they further believed that Wilcox was present wilfully and feloniously aiding and assisting them "substantially as set forth in the indictment", they should find the appellant guilty—of murder if the aid and assistance was given wilfully, deliberately and maliciously, and guilty of manslaughter if he acted upon sudden heat or passion.

The language objected to was at most mere surplusage. The court had enumerated the acts of the appellant as stated in the in-

dictment, and as the evidence conduced to prove, and having thus stated them to the jury, the use of the words "substantially as set forth in the indictment" cannot have either misled the jury or otherwise have prejudiced the rights of the appellant.

Nor can he have been prejudiced by the failure of the court to define the word "malice", first, because such attempts will generally, if not always, rather confuse than enlighten the jury; and, second, because not having been found guilty of an offense of which malice is an ingredient, he could not have been prejudiced by the omission, even if such a definition had been proper.

There was no error in refusing instruction No. 6, asked for by the appellant. Whether the defendants conspired to injure the deceased or not each one of them who willfully and feloniously aided or assisted in inflicting the injuries upon him, or who was present, aiding or assisting those who did inflict the injuries, is responsible for all that was then done, whether done by himself or by another.

Judgment *affirmed*.

J. W. McPherson, for appellant. Moss, for appellee.

L. GROSS v. M. LIEBER'S ADM'R, ET AL.

Extinguishment of Dower by Partition.

A voluntary petition between tenants in common, if free from fraud and fairly made, will have the effect to transfer the dower of the wives of the partitioners to the lands allotted in such partition, and the wife of one party to the partition thereby relinquishes her claim of dower in the land given to the other.

APPEAL FROM McCracken Court of Common Pleas.

June 26, 1879.

OPINION BY JUDGE COFER:

A voluntary partition between tenants in common, if free from fraud and fairly made, will have the same effect on the rights of the wives of the co-tenants to dower as partition by legal proceedings. I Scribener on Dower 327; *Davis v. Logan*, 9 Dana 185. That partition by legal proceedings would confine the wife's right to the portion set apart to her husband, is conceded.

The husbands having agreed upon partition, and Gross having conveyed to Lieber the portion allotted to him, Mrs. Lieber's right

to dower in the portion allotted to Gross was extinguished. As Mrs. Lieber had no right to dower in the lots embraced in her husband's deed to Gross, her failure to sign did not warrant Gross's refusal to accept it.

Wherefore the judgment is *affirmed*.

Jas. Campbell, Jr., T. E. Moss, for appellant.

J. C. Gilbert, for appellee.

J. F. EDMISTON, ET AL., v. THOMAS EDMISTON, ET AL.

Revocation of a Will or Codicil.

The statute provides that "no will or codicil shall be revoked" except in some one of the modes enumerated in the statute. No mere intention, however expressed, unless carried into execution, can have this effect.

Declaration of Deceased Person to Establish a Will.

Evidence of the declarations of a deceased person cannot be received to establish a will.

APPEAL FROM GARRARD CIRCUIT COURT.

June 26, 1879.

OPINION BY JUDGE COFER:

The statute expressly provides that "no will or codicil shall be revoked" except in some one of the modes therein enumerated. No mere intention, however expressed, unless carried into execution by some of the acts designated in the statute, can have the effect to revoke a will. The statute is plain and peremptory, is founded in wisdom, and has the sanction of experience. The legislature did not mean to have the devolution of estates to be controlled by parol evidence.

We have recently decided that the evidence of the declarations of a deceased person cannot be received to establish a will (*Mercer's Adm'r v. Mackin*, 14 Bush 434), and the same reasons require us to hold that a will once duly executed cannot be revoked except in one of the modes provided by the statute.

Judgment *affirmed*.

Deeny & Tomlinson, for appellants.

R. M. & W. O. Bradley, Anderson & Herndon, for appellees.

ALLEN ROLLINS *v.* GREEN & HAWKINS.**Adjudication in Bankruptcy.**

An adjudication in bankruptcy will not deprive the state court of its jurisdiction already acquired to inquire whether the bankrupt had committed an act within the statute of 1856 which would amount to an assignment of all of his property for the benefit of all of his creditors. The only effect the adjudication could have in such a case would be to protect the bankrupt against a personal judgment.

APPEAL FROM BRECKINRIDGE CIRCUIT COURT.

September 9, 1879.

OPINION BY JUDGE COFER:

The adjudication in bankruptcy did not oust the state court of its jurisdiction already acquired to inquire whether Rollins had committed an act within the statute known as the act of 1856 (*Linthicum v. Fenley*, 11 Bush 131), and especially so when the assignee asserts no claim to the property in litigation in the state court.

The only effect the adjudication could have in such a case would be to protect the bankrupt against a personal judgment, but that is not assigned as error and cannot be considered. Both the judgment and assignment of errors show that there was evidence before the court below, but no evidence has been brought before us, and we must presume the evidence authorized the judgment rendered. *Huffaker & Shy v. National Bank of Monticello*, 13 Bush 644.

We do not regard that part of the answer referred to by counsel as affirmative. The appellees' action did not question either the bona fides of the transaction nor the sufficiency of the consideration. The sale and purchase made have been made in perfect good faith, without any purpose to defraud any one, and upon a valid and sufficient consideration, without at all affecting the question presented by the appellees' case. It has never been held that a sale or mortgage within the act was on that account alone fraudulent.

Wherefore the judgment is *affirmed*.

Lewis & Fairleigh, for appellant. Clifford Moorman, for appellee.

A. MITCHELL & BRO. *v.* W. G. REDMAN.**Reply Must Be Sworn to When Filed Out of Term Time.**

It is error for the court to permit a reply to be filed out of term time when it is not sworn to, and when the defendant has done nothing to waive his right to have such reply verified.

APPEAL FROM LOUISVILLE CHANCERY COURT.

September 9, 1879.

OPINION BY JUDGE HARGIS:

The court might, in its discretion allow the reply to be filed after the time prescribed by law. Section 161, Myers' Code.

But Sec. 142 required "the petition, answer, and reply" to be verified by the affidavit of the party. To have the reply verified was a right in the defendant over which the court had no discretion. The defendants did nothing to waive that right, but upon the contrary insisted upon it, and the court erred in permitting the reply to be filed out of term time without verification.

Wherefore judgment is *reversed* and the cause is remanded with directions to overrule the motion to file the reply, and for further proper proceedings.

Russell & Helm, for appellants. Young & Boyle, for appellee.

FRANCIS JEFFERSON v. DAVID WOOD.**When Motion for New Trial Must Be Made.**

A motion for a new trial, except where based on newly discovered evidence, must be made at the term in which the verdict or decision is rendered, and within three days thereafter, unless unavoidably prevented.

APPEAL FROM ROBERTSON CIRCUIT COURT.

September 9, 1879.

OPINION BY JUDGE COFER:

A motion for a new trial except for newly discovered evidence, must be made at the term in which the verdict or decision is rendered; and within three days thereafter unless unavoidably prevented. Section 342, Bullitt's Code. The verdict in this case was rendered December 10, 1877, which was on Monday. The grounds for a new trial were not filed until December 13. The motion therefore came too late. *Long v. Hughes*, 1 Duv. 387; *White v. Crutcher*, 1 Bush 472.

The only error alleged which we can consider is that the petition does not contain facts sufficient to constitute a cause of action.

We perceive no valid objection to the petition, and none is pointed out. Wherefore the judgment is *affirmed*.

Ross & Little, for appellant. E. C. Phiester, for appellee.

COMMONWEALTH *v.* J. T. BERRY.**Criminal Law—Gaming House.**

An indictment for permitting gambling, which describes the gaming house as that of John Shepherd, is sufficient to describe the place, and there is no variance in proof when it shows that the title of the property was in the name of Shepherd's wife.

APPEAL FROM HARDIN CRIMINAL COURT.

September 9, 1879.

OPINION BY JUDGE PRYOR:

This judgment must be reversed. The fact that the house was conveyed to the wife of Shepherd was no mis-description of the property, or such a variance as made the proceeding defective, nor did the fact that this particular room was occupied by some one else. The property or house was described with sufficient certainty, when called John Shepherd's house, although the title was in the wife. Sec. 128, Criminal Code, makes such description immaterial. If the act is identified it is sufficient. It was necessary under this particular statute to have made some allegation as to the place or house in which the gambling was had. This was sufficiently alleged and proven.

Judgment *reversed* and cause remanded for further proceedings.
Hardin, for appellant.

COMMONWEALTH *v.* GIN JONES, ET AL.**Criminal Law—Accomplices.**

There can be no accomplices in the offense of gambling. Each defendant is liable as principal.

Charges of Gambling.

The act of gaming by one person will not make others present liable, although those present may have advised it or played in the game. There is in a legal sense no such thing as an accessory or an accomplice in the offense of gambling.

APPEAL FROM HART CRIMINAL COURT.

September 9, 1879.

OPINION BY JUDGE PRYOR:

The parties indicted, if guilty, were each guilty of a separate offense and liable to separate punishment. There are no accom-

plices in such offenses, each being responsible for his individual act. Each play the game, and the one is not liable because the other engaged in it, but for the reason that he himself violated the law. This is unlike cases of felony where by concert of action between the parties one of the number is induced or persuaded to commit a theft or robbery, or where others aid or abet in the commission of a felony. The act of gaming by one will not make another responsible, although he may have advised it, or played in the game. There is in a legal sense no such thing as an accessory or an accomplice in such an offense. The commonwealth, however, has proceeded on the idea and by a distinct allegation that the game was played at a certain time and by certain parties. After failing to prove the offense as alleged, the commonwealth undertakes to prove the playing of a game by other parties with "A" at a different time. Where the commonwealth alleges certainty as to time and parties it must be held at variance to prove a playing at some other time and with other parties. While time is not generally material it may be made so by reason of other allegations.

Judgment affirmed.

Hardin, for appellant.

COMMONWEALTH v. JAMES DUNN.

Criminal Law—Sufficiency of Indictment.

In order to make an indictment good against a licensed liquor dealer for suffering spirituous liquors to be drunk in his saloon by one in the habit of becoming drunk, it must be charged that the accused knowingly suffered such liquors to be drunk in his saloon.

APPEAL FROM LOGAN CIRCUIT COURT.

September 9, 1879.

OPINION BY JUDGE COFER:

"That it shall not be lawful for any person having a license to sell spirituous, vinous or malt liquors by the drink or otherwise, to sell, give or loan of such liquors, or the mixture of either, knowingly, to any person who is an inebriate, or in the habit of becoming intoxicated or drunk by the use of such liquors, or to suffer or permit any such person to drink any of such liquors, or the mixture of either, in his bar-room or saloon, or in or upon any tenement or premises

in his possession or under his control. Any one so offending shall be subject to a fine of fifty dollars for each offense, to be recovered by indictment of a grand jury in any court of competent jurisdiction, or by warrant before the county judge or a justice of the peace of the county in which the offense was committed; and the person so found guilty shall also be deemed as having forfeited his license, and the court before which the trial is had shall so adjudge." Sec. 2, Act March 6, 1878, Sess. Acts, page 30.

The appellee, who is a licensed vendor of liquors, was indicted under the statute for suffering "E. W. Wyatt to drink spirituous liquors in his, Dunn's, saloon, he, Dunn, being then a licensed seller of spirituous liquors, and said E. W. Wyatt being in the habit of becoming drunk by the use of such liquors."

The circuit court sustained a demurrer to the indictment and the commonwealth has appealed. The judgment is correct. The language of the statute provides "that it shall be unlawful to sell, give, or loan such liquors, knowingly, to any person who is an inebriate, or in the habit of becoming intoxicated or drunk by the use of such liquors, or to suffer or permit any such person to drink of such liquor, or a mixture of either, in his saloon," etc.

It is clear that in order to convict for selling, giving, or loaning liquors to an inebriate it is necessary to show that the defendant knew that he was an inebriate "or in the habit of becoming drunk", and the rules of both legal and grammatical construction require that the second clause of the sentence should be construed as if it read "or knowingly to suffer or permit any such person to drink," etc.

Because of the omission to allege that the defendant had knowledge of the habit of Wyatt to become drunk, the indictment was bad.

Judgment affirmed.

Hardin, for appellant.

I. W. THEIRMAN ET AL., v. W. F. COLDEWAY.

Allotments Under Partition.

Where one of several tenants in common improves a portion of the common estate he is entitled, upon a partition being had to have that part allotted to him, if it can be done without injustice to his co-tenants, and in making partition the property should be valued exclusive of such improvements.

APPEAL FROM LOUISVILLE CHANCERY COURT.

September 11, 1879.

OPINION BY JUDGE COFER:

Only Mrs. Theirman and the three bankrupts, represented now by their assignees, were bound on the lease, and the covenant to purchase and pay for the appellee's improvements at the termination of his lease. The other children of Henry Theirman were not liable to the lessee, who would have been compelled to look alone to the four adults who were bound on the lease and covenants contained in it. As these latter were therefore alone responsible for the value of the improvements put upon the lot by their lessee, they should be entitled to the benefit of the improvements. If the three bankrupts had with their own means erected the improvements there could be no serious question of their right in a partition between themselves and their co-parceners to have the improved lot set apart to them and have it valued as if unimproved. That one of several tenants who improves a portion of the common estate is entitled in partition to have that part improved allotted to him if it can be done without injustice to his co-tenants, is a proposition too obvious to require either argument or the citation of authorities. It would seem to be equally manifest that in making partition the property should be valued exclusive of his improvements. In that way only can he get that which in equity and good conscience is his own, and in no other way can the other tenants be prevented from getting something which does not belong to them.

The buildings erected by the appellee, though not erected at the cost of Mrs. Theirman, Herman W. Theirman, W. G. Theirman and Henry Theirman, Jr., were erected under a contract with them which bound them and them only to pay for the improvements, and therefore it was imperatively demanded by the plainest principles of natural justice that in making partition the chancellor, if he could do so without violating established principles of law, should so partition the property as to give to those who are liable for the value of the improvements the benefit of them. This has been done not only without violating any principle of law, but in exact accordance with a well established rule applicable to the partition of real estate.

No question between landlord and tenant arises in this case. Mrs. Theirman and her three sons, who became bound with her on the lease, were appellee's landlords. They procured him to make the

improvements and became bound to pay him for them. They do complain that the chancellor has so partitioned the estate as to protect their tenant, and these appellants who have received such a full share of the real estate of their ancestor, in the condition in which he left it to them, have no right to claim the benefit of meliorations made as a part of it at the expense of their co-tenants, and which has not and never can cost them one cent, and which are not on their land.

The judgment must be *affirmed*.

Lane & Harrison, for appellants. B. Bacon, for appellee.

JOHN J. BARRETT, TRUSTEE, ET AL., v. CHARLES GODSHAW.

Mayor's Certificate.

Where the mayor is required to certify to papers or to records, and such requirement is not fulfilled by his merely attesting the same.

Authentication of Record Evidence.

Where a paper offered in evidence does not purport to be a copy, and the one who has the custody of the original fails to certify that it is a copy, the court has no right to conclude that it must be a copy, upon the presumption that it came from the hands of the custodian. Before such a paper can be introduced in evidence it must be certified to be a copy of the original by the custodian of the original.

APPEAL FROM LOUISVILLE CHANCERY COURT.

September 18, 1879.

OPINION BY JUDGE PRYOR:

If the rule contended for by counsel for appellee is regarded as the law of this case, it cannot affect the decision of the principal question because the attention of the court was called to the objection made to the record as evidence, namely, the want of a proper certification. The chancellor in his judgment expresses the opinion that the exhibits offered were not only competent but properly certified, and for that reason overruled the exceptions, or disregarded the objection made by the appellants. Neither the court nor counsel could have been misled, and appellants must have made known their objection as the court below has ruled directly on the question raised in this court.

The mere attestation by the mayor is no evidence that the exhibit

offered were copies of the originals unless the paper to which the mayor's name is appended purports to be a copy, or the mayor certifies that it is a copy. "A copy from the mayor's office of any city, attested by the keeper thereof, shall be evidence for any purpose for which the original could be received."

Where there is a statement by the mayor that it is a copy, or where the paper upon its face purports to be a copy and is attested by the mayor, in either state of case the authentication must be held sufficient. In this case various papers were thrown together, attested either as copies or original documents, with the attestation of the mayor as follows:

"Attest,

"CHARLES D. SOCES,

"Mayor."

That this is an original paper evidencing the facts upon which the appellants are to be made liable cannot be determined by this court, and that it is a copy nowhere appears, either on the face of the papers, or from the attestation of the mayor. The statute prescribes the manner in which such documents are to be authenticated so as to make them competent, and a mere attestation is no evidence that it is a copy.

We find no case sustaining such an authentication, or authorizing the inference that the paper offered in evidence is a copy, for the reason alone that it is attested by the custodian. Where a clerk attests a paper that recites on its face the fact of its being a copy, the mere attestation is sufficient, if emanating from his office, or a statement merely that it is a copy, viz: "Copy attest: A. B., Clerk." Such a certificate would amount to an authentication.

In the case of *Chrisman v. Gregory's Heirs*, 4 B. Mon. 474, the clerk certified that the paper was a true copy. The original certificate had been signed by a former clerk, whose title was not affixed to the signature, and proof was admitted to show that he was clerk when the will was probated. The then clerk had certified that it was a true copy of the original will as appeared from the records in his office. Where the paper offered in evidence does not purport to be a copy, and the one who has the custody of the original fails to certify that it is a copy, the court has no right to conclude that it must be a copy, upon the presumption that it came from the hands of the manifest custodian, and particularly when the statute points out the mode of authenticating such records. The plaintiff therefore

had no right to a judgment as the right of recovery depended upon the validity or existence of the ordinance.

It is not necessary, with this view of the case, to notice the other questions raised.

The judgment is *reversed* and cause remanded for further proceedings consistent with this opinion.

R. W. Woolley, for appellants. Young & Boyle, for appellee.

CITY OF NEWPORT *v.* C. J. LIMERICK, ET AL.

Garnishment of City.

Where the city is garnisheed in an action against one claiming to be a creditor of the city, and the city answers denying the indebtedness, it is error to permit the plaintiff to take judgment against the city in that action. This could only be done after issue formed between the plaintiff and the city in an original action.

APPEAL FROM CAMPBELL CHANCERY COURT.

September 20, 1879.

OPINION BY JUDGE PRYOR:

This judgment must be reversed. There is no cause of action alleged against the city by Walsh, or by those who are seeking to make the city liable by the debts of Walsh.

It is alleged that the city of Newport is indebted to Walsh, and that some of the petitions in a sum more than sufficient to pay the debt. This indebtedness the city expressly denies, and the allegation that the city has paid the debt is in aid of the denial. At least, the denial having been made by the garnishee, it ended the case. The clerk or officer of the corporation may be examined on oath and his statements, when showing an indebtedness will authorize a judgment against him and so of any garnishee. The law, as has often been decided by this court, is that where a garnishee has been summoned and appears, he may be examined, and for that purpose he may be compelled to appear; but when appearing and denying any indebtedness it ends the case, if he is simply proceeded against as a garnishee. If he fails to make a satisfactory disclosure the creditor of the debtor may proceed against him by an original or amended pleading, setting forth the indebtedness and the consideration. In other words, he sues in the name of the debtor, and must allege and prove his cause of action in order to succeed.

The complaint in the case is that the garnishee has not disclosed. The answer is certainly as good as the complaint. One says he owes and the other denies it. The disclosure is not satisfactory, or the denial precludes the creditors from proceeding further except to examine the garnishee. This he is not willing to risk, and the statute then provides that he may sue in the name of the debtor. The errors in this case, or one of them, as assigned, is that no cause of action has been alleged against the city.

The judgment in the consolidated causes is *reversed* and cause remanded. The parties may amend their pleadings, if in time. See *Wilder v. Shea*, 13 Rush 128.

A. T. Root, for appellant.

F. M. Webster, E. W. Hawkins, for appellees.

B. H. PAYNE v. E. D. PAYNE, ET AL.

Setting Aside Award.

The courts have the right to set aside an award upon equitable principles. Fraud or palpable mistake as to the law or facts is the only ground for revising an award by the chancellor.

APPEAL FROM BUTLER CIRCUIT COURT.

September 20, 1879.

OPINION BY JUDGE PRYOR:

It appears from the record in this case that the questions at issue between the parties were submitted to the arbitrament of Payne and Clark, the two having been selected to adjust the differences between them, and their report or award to be made the judgment of the court. The power of the chancellor to determine the equitable rights of the parties has been taken from him, and a statutory reference agreed upon, and now this court is asked to reverse the judgment below for no other reason than that the weight of the evidence upon many of the issues is with the plaintiff. The award, it is true, by the entry of record, was to be made the judgment of the court, and so of every statutory award made between parties, and although an appeal is allowed in this case this court will not disturb a judgment that was not rendered by the chancellor. The right is reserved to the courts to set aside an award upon equitable principles, as if no statute in regard to awards had been enacted. Fraud or palpable mistake as to

the law or facts is the only ground for revising an award by the chancellor. Exceptions may be taken to an award made under the statute, for the reason that the statute has not been followed, but no such exception can be sustained in this case, as the parties have dispensed with many of the formalities by an entry of record, and we perceive no objection to its validity.

There is not a single issue presented in the case about which process has been introduced, that is not supported by testimony on each side and in many instances so conflicting as to make the statements irreconcilable. There is no fraud on the part of the arbitrators, and no palpable mistake of law or fact. Whether the \$15,000 note belonged to the plaintiff is involved in doubt, and as to the nature of defendant's title to the land, no defect has been pointed out, except the existence of encumbrances that were known to the appellant when he made the purchase. Waiving, however, the discussion of the facts in the case, parties litigant have no power to divest the chancellor of his jurisdiction, except in the manner provided by the statute, and a judgment or award made by arbitrators will not be regarded as a judgment rendered by the chancellor so as to give this court that supervisory power over the case that it has where the chancellor alone acts.

The powers of courts of chancery over awards have not been increased or diminished by the statute, except in regard to certain formalities connected with the proceeding.

The award in this case was made pursuant to the submission. The parties were present when the hearing took place. The award is made the judgment of the court. An award is intended to be a final settlement of the controversy between the parties, and an agreement that it shall not be so regarded will not give this court the jurisdiction to reverse or affirm the judgment as in ordinary cases. If equitable grounds exist for setting the award aside the chancellor must be appealed to. The award being regular in this case, and no exception taken that can affect its validity under the statute, this court must dismiss the appeal. The same is therefore *dismissed*.

P. G. Stiver Perkins, for appellant.

COMMONWEALTH v. WILLIAM J. HAYES.

Criminal Law—Indictment.

A demurrer to an indictment should not be sustained because of the fact that the title of the case is not stated in the usual form at the head of the indictment.

APPEAL FROM GRAVES CIRCUIT COURT.

September 23, 1879.

OPINION BY JUDGE COFER:

That the title of the prosecution was not stated in the usual form at the head of the indictment certainly furnished no ground for a demurrer.

Sec. 165, Criminal Code, enumerates the grounds upon which an indictment may be demurred to. If the failure to state the title of the prosecution is embraced in any of these grounds, it is in the second, which is: "If the indictment does not substantially conform to the requirements of Art. 2, Chap. 2, of Title 6."

Sub-sec. 1, Sec. 122, Criminal Code, provides that the indictment must contain the title of the prosecution, specifying the name of the court in which the indictment is presented and the names of the parties. These requirements are merely formal, and their omission is not a substantial deviation from the requirements of Sec. 122, and especially so when the name of the court is given and the name of the defendant is mentioned in the accusing part of the indictment.

Judgment *reversed* and cause remanded with directions to overrule the demurrer.

Hardin, for appellant. Boone & Stanfield, for appellee.

HENRY SHAFFNER, ET AL., v. COMMONWEALTH.**Forfeiture of Bail Bond.**

A proceeding to forfeit a bail bond is a civil proceeding, and is entirely different from the prosecution against the principal; it is against more than one person, and the judge not qualified to try the criminal case may try and determine the civil case.

APPEAL FROM METCALFE CRIMINAL COURT.

September 23, 1879.

OPINION BY JUDGE PRYOR:

There is nothing in the record to show that the accused was in court at the time the case was called for trial, and therefore the court properly forfeited the bond. The execution or forfeiture of the bond should not be regarded as part of the prosecution, to the extent, at least, of excluding a judge from hearing the case, whom objections had been made applicable alone to the charge contained in the indictment. The proceeding on the bond is against different parties, and it is in effect a civil action in the name of the commonwealth, and these sureties are making no objection to the judge who tried the case. It is an independent proceeding, and forms no part of the prosecution upon which the objection to the judge was based. In addition his failure to appear should be regarded as a waiver of his objections to the judge, and it is a matter of grave doubt as to whether a judge could have been selected in his absence. We perceive no valid objection to the summons.

Judgment affirmed.

Lewis & McQuown, for appellants. Hardin, for appellee.

CHARLES HOTTSINGER v. COMMONWEALTH.**Criminal Law—Gaming.**

One not betting on gambling games and not knowing that others bet on them cannot be said to have suffered games to be played at which money was bet. It is essential in such a case to show that not only the owner or controller of the house knew that the games were played, but that he knew money or another thing of value was bet on them. One cannot be guilty of suffering a thing to be done unless he knows that it is being done.

Suffering Gaming.

To constitute a good charge for suffering gaming it must be alleged by the state that the accused knew that the game was being played and that something was bet on it.

APPEAL FROM BOONE CRIMINAL COURT.

September 23, 1879.

OPINION BY JUDGE COFER:

It is not alleged that the appellant bet on the games, or that he knew that others bet on them. He cannot therefore be said to have

suffered games to be played at which money was bet. It is essential to show that not only the owner or controller of the house knew that the games were played, but that he knew money or other thing of value was bet on them. He must suffer both the playing and betting, and one cannot be said to suffer a thing to be done unless he knows that it is being done.

The word "suffer" in the statute is used in the sense of allowing by silent consent, or by not prohibiting; one cannot give silent consent that a thing be done unless the purpose of another to do the thing be known. An indictment for suffering gaming must therefore charge in some way that the defendant knew that the game was being played, and that something was bet on it. This may be done by using the language of the statute or other equivalent words.

All that is charged in the indictment may be true, and yet the appellant may have been ignorant that any betting was being done. The indictment for that reason failed to state facts constituting a public offense, and the judgment should have been arrested. Judgment *reversed*, and cause remanded with directions to arrest the judgment.

Green F. Riddell, for appellant. Hardin, for appellee.

THOMAS EVANS v. COMMONWEALTH.

Criminal Law—Evidence.

In a prosecution for perjury charging that the accused falsely wilfully and knowingly testified in a judicial proceeding that he saw a named person set fire to a certain house, which was burned by the firing, it was error for the court to refuse to permit the defense to prove that the named person did burn the house, that he had before that time threatened to burn it, and that the general character of said named person was bad and was that of a house-burner.

APPEAL FROM OHIO CRIMINAL COURT.

September 23, 1879.

OPINION BY JUDGE HINES:

Appellant was indicted and convicted upon the charge of falsely, wilfully and knowingly testifying, in a judicial proceedings, that he saw S. L. Midkiff set fire to a certain house which was burned by the firing.

On the trial appellant offered to prove by several witnesses that

Midkiff did burn the house, that he had previous to the burning threatened to burn it, and by other witnesses that the general character of Midkiff was bad, and that of a house burner. This evidence the court refused to hear, and this refusal is the principal cause of complaint on this appeal.

The gravamen of the charge against appellant is that he swore falsely when he stated that he saw Midkiff set fire to the house, and while Midkiff might have been innocent of the charge of burning, as the law presumes him to be, yet the fact would not be conclusive of the guilt of appellant; and on the other hand the guilt of Midkiff would not necessarily establish the innocence of appellant. Any evidence going to show that Midkiff did the burning would be competent as tending to establish the fact that appellant saw him do the burning, and should have been permitted to go to the jury with that view. The objection that a collateral issue would thus be found, and the guilt or innocence of one not charged with crime incidentally inquired into, is overbalanced by the consideration that in no other way can the accused have a full and fair presentation of the question of guilt or innocence. The weight of such evidence is, as in all other cases, for the consideration of the jury, and how far it may go to outweigh the evidence tending to show that appellant was not present or near the house the night it was burned, and could not, therefore, have known who set fire to it, cannot be a matter of speculation for the court. *Galloway v. State*, 29 Ind. 442. We are of the opinion that both in reason and on authority, the evidence was competent. For the reasons indicated it is competent to prove that Midkiff threatened to burn the house.

Inquiry may be made, for the purpose of impeaching him, into the general moral character of Midkiff, and as to whether he is worthy of credit on oath. *Henderson v. Hayne*, 2 Met. 342; *Thurman v. Virgin and Wife*, 18 B. Mon. 785. But evidence that he has been guilty of other acts of the kind charged, or that he has a tendency in that way, is not competent. I Wharton on Criminal Law, Sec. 640.

Wherefore the judgment is *reversed* and cause remanded with directions for further proceedings consistent with this opinion.

Walker & Hubbard, for appellant. Hardin, for appellee.

LOUISVILLE INDUSTRIAL EXPOSITION v. ROBERT A. JOHNSON, ET AL.

Process on Infants.

Where infants less than fourteen years of age are parties defendant service of a summons on their father is sufficient.

Guardian Ad Litem.

The court does not secure jurisdiction over infants by the service of a summons on a guardian ad litem appointed for them. Such a guardian can only be appointed after the service of process is had on them.

APPEAL FROM LOUISVILLE CHANCERY COURT.

September 23, 1879.

OPINION BY JUDGE HARGIS:

As to the children of Robert A. Johnson we think it is clear that the service of process was sufficient. It is true he was a party, and the service on him was as a party, but this made no difference. The sole object of the requirement that process against infants under 14 years of age shall be served on some third person was that notice of the suit should be brought to some one who would feel sufficient interest in the infant to appear and make defense of his interests, or cause it to be done. The summons in this case notified the father that his children had been sued, and thus accomplished all that could have been accomplished if he had not been a party.

In *Shaefer v. Gates*, 2 B. Mon. 453, process was not served on the infants in person, but was served on their guardian ad litem, who was not a party. The question was whether that substitutionary service was sufficient, and the court held it was not. Denny had been appointed guardian ad litem after the process was issued, and had not accepted. He occupied no relation to the infants that made it his duty to defend for them or which authorized service to be made on him for the infants. But in this case Robert A. Johnson was one of the persons designated by law to be served with process against his children, and stood in the same position in that regard that the guardian ad litem would have occupied if he had accepted the trust, and had then been served for the infants, which, according to the doctrine of *Gates* and *Bustard* would have been good service.

As to the children of Mrs. Johnson by her former marriage there is more room for doubt, but we incline to the opinion that it might be presumed that their step-father had the care and control of them.

Nor are we prepared to say that the service on the guardian was no good as to all in a case like that, for the sale of their real estate True, service upon him for them seems an idle formality. But when we consider the nature of the proceedings, and the fact that the garnishee might have proceeded ex parte in the name of himself and wards, and without process in any form against them, to procure a judgment to sell their property, it does not appear so absurd to hold that process against them might be served on him as guardian to bring them into court where they could have the benefit of defense by guardian ad litem.

In our opinion the service of process upon the infant and his father or guardian in such a case is sufficient, and the judgments appealed from are *affirmed*.

H. C. Pindell, for appellant. P. B. Muir, for appellees.

LOUISVILLE CITY NATIONAL BANK *v.* BAXTER & FISHER.

Answer of Garnishee.

An answer of one served as a garnishee is conclusive as to the amount of his indebtedness to the defendant.

Examination of Garnishee.

A garnishee may be examined on oath by the plaintiff with reference to his indebtedness to the defendant, and if not satisfied with the facts thus obtained, the plaintiff may sue the garnishee in the name of the debtor, alleging a cause of action that the defendant himself might allege if he were the party making the complaint.

APPEAL FROM LOUISVILLE CHANCERY COURT.

September 25, 1879.

OPINION BY JUDGE PRYOR:

The appellees having been summoned as garnishees only, their answer must be deemed conclusive as to the amount of their indebtedness. They may be examined on oath by the plaintiff with reference to the indebtedness, and if the plaintiff is not satisfied with the disclosures made either by the answer or the oral examination if such is had, the only remedy is to sue the garnishees in the name of the debtor, alleging a cause of action that the debtor himself must allege if he were the party making the complaint. As the case stands the chancellor could have rendered no other judgment. The

rents falling due after the sale and confirmation would pass to the purchaser as against the debtor or his creditor.

Judgment *affirmed*.

Young & Boyle, for appellant. Russell & Helm, for appellees.

H. B. BLICK v. COMMONWEALTH.

Criminal Law—Intoxicating Liquors.

Where one holds a license as a merchant to sell liquor in quantities of not less than a quart, "to be taken off and drunk elsewhere than on his premises or adjacent thereto," sells such liquors, and the purchaser takes them into the highway adjacent to the seller's premises, and drinks them there, the seller is guilty of a violation of the statute against keeping a tippling house.

Power of Legislature.

In granting a license to sell liquors the general assembly has a right to attach to it any conditions it may deem proper, and may hold the licensee responsible for the use made of intoxicating liquors sold by him, and where he accepts such a license he cannot complain at being so held responsible.

APPEAL FROM LOGAN CIRCUIT COURT.

September 26, 1879.

OPINION BY JUDGE COFER:

The appellant was indicted and convicted of the offense of keeping a tippling house. It was admitted on the trial that he had a license as a merchant to sell in quantities of not less than a quart, "to be taken off and drank elsewhere than on his premises or adjacent thereto." Sec. 1, Art. 2, Chap. 106, General Statutes. The evidence conduced to prove that he sold whisky by the quart; that buyers took it out into a public street or road running in front of the store where the liquor was purchased, and then drank it, as we assume, without the appellant's knowledge or consent.

The court instructed the jury, in substance, that although the appellant sold by the quart only and had a license to so sell, yet if those who bought whisky of him took it into the public highway, adjacent to the premises on which it was purchased and there drank it, they should find the defendant guilty. The statute provides that "any person, unless he have a licensé therefor, who shall sell in any quan-

tity wine or spirituous liquors, or the mixture of either, in any to be drunk therein, or on adjacent premises to where sold, or sell the same, and it shall be so drunk, shall be deemed guilty of keeping a tippling house, and fined the sum of sixty dollars."

A similar provision in the Revised Statutes was construed in *and Ward v. Commonwealth*, 14 B. Mon. 386, and it was there held that "if the liquor which shall be sold in any store-room or house, regardless of quantity, whether it be a gill or a hogsheaf or more, shall be actually drank upon the premises or upon any public square, road or street, or upon adjacent premises, the value of which shall be less than one acre, by any person, or by whoever he may be, except a licensed tavernkeeper, is guilty of keeping a tippling house," etc.

The rule there laid down has been adhered to in many unpublished cases, and must be presumed to have been well known to the legislature, and the incorporation of the same provision in the General Statutes must be regarded as a legislative approval of that construction, and we do not feel at liberty now to depart from it. Now we prepared to say that if the question was an open one we would not give the language the same construction.

Counsel contends that the appellant, having a merchant's license, was authorized to sell by the quart, and having sold in no other way did not, by any act of his, violate the law, and that to punish him for an act done by another without his consent and in the public way where he had no power to control his action is unreasonable and unconstitutional. In this we do not concur. The legislature in granting a license had a right to attach to it such conditions as it saw proper, and to hold the licensee responsible for the use made of intoxicating liquors sold by him, and one who accepts and sells under a license cannot complain that he is held to such accountability.

Wherefore the judgment is *affirmed*.

J. S. Galloday, for appellant. Hardin, for appellee.

WILLIAM C. KNIGHT, ET AL., v. E. C. BERRY, ET AL.

Delivery and Acceptance of Deed.

Where a deed is made to a number of grantees and delivered to one of them, who accepts its delivery to him, acceptance by him is deemed to be acceptance by all.

Rescission of Contract.

Where a contract has been executed by a conveyance made and accepted, the contract cannot be rescinded unless there was fraud in procuring the acceptance of the deed, or for some reason such as the insolvency or non-residence of the grantor.

Burden of Proof on Grantee.

Where a deed has been delivered and accepted and the grantee seeks a rescission of the contract on the ground of fraud, non-residence or insolvency of the grantor, the burden is on him to show grounds for relief, and when the case admits of it he should bring before the court those at whose hands he anticipates danger to his title, and compel them to set up and litigate their title and manifest its superiority, or be barred of further claim.

APPEAL FROM BUTLER CIRCUIT COURT.

October 1, 1879.

OPINION BY JUDGE COFER:

The bargain was concluded and the notes executed more than four years and a half before this suit was commenced.

By the terms of the contract, as proved by Berry, Deweese was to make a deed at the time the contract was concluded. A deed was in fact written on that day and acknowledged by Deweese and his wife four days afterward, and left by some one in the office of the clerk of the county court of Butler county where the land lies.

Berry took possession immediately and has remained in undisturbed possession ever since. Soon after the date of the notes the greater part of them were assigned to the plaintiffs, and Deweese removed from the state and has been a non-resident ever since.

The Berrys continued to make payments from time to time, having paid more than one-half of the purchase money before this suit was commenced. They offered, more than once, to sell portions of the land, and declared they were able to convey a good title. They held no bond for title, and unless they accepted the deed they had no written memorial of the title, yet they continued to pay money from time to time to the assignees without at any time, so far as appears, making objection on account of a want of title in Deweese or because he had not made them a deed until about the time this suit was commenced.

Moreover, Deweese swears he made the deed and delivered it to some of the grantees and this is not in terms denied by any of them although they testified in the case. No attempt is made to explain

the unusual conduct of the purchasers in paying more than \$2, the purchase-money without any written memorial of the contract, and that to assignees, from whom they could not recover it but in case their non-resident vendor should refuse to convey to them. These facts seem to us not only to warrant, but to compel, the conclusion that the deed was accepted. *Harris v. Shirley's Ex'r's Heirs*, 3 J. J. Marsh. 22.

When such a contract has been executed by a conveyance and accepted, the contract cannot be rescinded, except there be fraud in procuring it or in procuring the acceptance of the deed for some reason, such as the insolvency or non-residence of the grantor, the warranty will prove ineffectual for the protection of the grantee in case of eviction. *Vance v. House's Heirs*, 5 B. Mon. 537; *Miller v. Long*, 3 A. K. Marsh. 334; *Royster v. Shackelford*, 5 B. Mon. 228.

Even when the grantor has become insolvent or a non-resident, an executed contract should not be rescinded unless the vendee can show not only that there are defects in the title, but that there are reasonable grounds to apprehend that he is in peril of losing the whole or some part of it, on account of an outstanding title superior to that of his grantor. *Taylor v. Lyon*, 2 Dana. 276; *Vance v. House's Heirs*, 5 B. Mon. 537. The onus lies on the grantee in such a case to manifest grounds for relief, and when the case admits of it, he should bring before the court those at whose hands he anticipates danger to his title, and compel them to set up and litigate their claim, and manifest its superiority, or be barred of all further claim. *Doe v. Wickliffe*, 1 Met. 216. And when such outstanding claim is set up the vendee should evince an honest disposition to have his title perfected or guaranteed, and make proper efforts for the effectuation of that end, and for a trial of all conflicting claims. *Lyon v. Taylor*, 2 Dana. 276.

Tested by these well-established equitable principles there should not have been a rescission in this case.

Accepting as true every substantive fact alleged in the amended cross-petition, which is unanswered, and every fact alleged in the original cross-petition, which is sustained by the evidence, there is not in our opinion any reasonable ground for apprehending that a considerable portion of the land conveyed to the appellees can be covered by any of the persons named as having a claim to it. The greater portion of it has been held in actual adverse possession

nearly forty years by the appellees and their vendors, immediate and remote. This possession has been held under a title of record which, though irregular and in some respects imperfect, has been so perfected by actual occupation and improvement as to bar all claimants not under disability to sue. That some of those whose title may not have passed under the conveyance under which the land is held may have been all the time under the disability of coverture is probable. But the interests of these persons are small, and while it is possible they may assert claim to the land it is quite improbable that they will do so.

The heirs of Phillip Phillips, the elder patentee, under whom the land is claimed, were made parties to appellees' cross-petition. Some of them reside in this state, but they were never brought before the court; others are non-residents, or unknown, and the cause was so prepared as to them that a judgment barring any claim on their part might have been entered, but this was not done. So far as the heirs of Robert Smith are concerned, the land has been held adversely to them for more than fifty years, and it has been held adversely to Samuel Smith and the Bank of the United States since 1836. The claims alleged to be asserted by Elder & Proctor Company were disowned by them. The objection that the deed of Preston and wife was not recorded in time to bar Mrs. Preston's potential right of dower was not set up as an objection to the title, and therefore furnished no ground for relief. The heir of Daniel Deweese was not made a party, and besides the evidence shows that he never had any enforceable claim to an interest in the land.

The objections to the title are unsubstantial, and did not, in our opinion afford sufficient ground for rescinding an executed contract. But the plaintiffs voluntarily tendered a bond with sureties worth in the aggregate many times the value of the land, and who resided in the county, guarantying the title. This may be taken to be an admission on their part that it was not entirely sufficient, and the court should have required the appellees to accept the bond, and then dismissed their cross-petition, at the plaintiffs' costs, and have rendered judgment to enforce the lien for the unpaid purchase money.

Judgment *reversed* and cause remanded for a judgment in conformity to this opinion.

H. A. James, H. T. Clark, for appellants.

B. L. D. Guffy, William Ward, for appellees.

T. P. SMITHINSON'S ADM'R, ET AL., v. NANCY ULURLLEN'S ADM'R.

Sufficiency of Petition on Bond.

The stipulations of a bond upon which a recovery is sought must be alleged in the petition in order that the liability of the bondsmen may be determined. The breach must also be alleged.

APPEAL FROM NELSON CIRCUIT COURT.

October 2, 1879.

OPINION BY JUDGE PRYOR:

It has been often decided by this court that the stipulations of the bond upon which a recovery is sought must be alleged in order that the liability of the obligators may be determined. It will not be an answer to say that the bond is in the usual form, or that the bond is made part of the record; the covenants must be distinctly set forth and the breach alleged. It cannot be said from the petition in this case that any covenant was entered into by which the appellants become liable on account of a devastavit.

It is alleged that the defendant McKay duly executed his bond and that he failed to keep the covenants of his bond. What covenants were is nowhere stated, and in the absence of such averment the judgment by default was clearly erroneous.

The judgment is *reversed* and cause remanded that the appellants may amend, and for further proceedings.

E. E. McKay, for appellants. J. W. Thomas, for appellee.

ARTHUR, HAGGARD & COMPANY v. J. M. McARTHUR.

Endorser's Discharge.

An endorser is discharged by the want of diligence to collect from the principal, and where it is sought to hold the endorser because of the insolvency of the principal as an excuse for the want of diligence, the law requires not only the insolvency of the maker, but that it shall be established by a certain character of evidence, where the petition shows solvency on its face, or that the character of proof demanded cannot be produced, no cause of action is set forth.

Diligence Required to Hold Endorser.

Notwithstanding the insolvency of the maker of a note it is not necessary for a plaintiff seeking to hold an endorser to show that he has used due diligence to collect the debt of him, for although insolvent he may not be without credit.

APPEAL FROM CAMPBELL CIRCUIT COURT.

October 3, 1879.

OPINION BY JUDGE HINES:

The amended petition, the filing of which the court refused, exhibits the fact that judgment was obtained against the maker of the notes on the 4th day of June, 1874, and that execution did not issued until the 8th day of March, 1875. The amended petition further alleges that the maker of the notes was hopelessly insolvent at the time the notes fell due, and has continued so ever since, and that on the 11th of April, 1875, he filed his petition to become a bankrupt.

Ordinarily no action can be maintained on assignment until the assignee has judgment, execution, and return of "no property." Among the exceptions may be mentioned the case of removal from the state of the maker after the assignment and before maturity, and the case of adjudication in bankruptcy a few days after the note falls due. *Roberts v. Atwood*, 8 B. Mon. 209; *Tucker v. Fogle*, 7 Bush 290; *Graves v. Tilford*, 2 Duv. 108; *Chambers v. Keene*, 1 Met. 289.

It is clear that the want of diligence as shown in the petition releases the assignor, unless the fact of insolvency of the maker relieves from the necessity of such diligence, as is required in ordinary cases. If the insolvency is not a sufficient excuse for delaying execution the court did not err in refusing to permit the amended petition to be filled, because it affirmatively shows that the proof necessary to establish insolvency, to-wit: diligent obtention of judgment, execution and return of nulla bona, cannot be produced. The law requires not only the insolvency of the maker, but that it shall be established by a certain character of evidence; and where the petition affirmatively shows solvency, or that the character of proof demanded cannot be produced, there is no cause of action set out.

In *Clair v. Barr*, 2 A. K. Marsh. 255, it is said: "But notwithstanding the insolvency of the maker of the note, it was still necessary for the plaintiff to show that he had used due diligence to collect the debt of him, for although he was without property, he might not have been without credit, and if due diligence had been used to collect the money of him, he might have made an arrangement to secure or satisfy the debt." *Trimble and Jarrett v. Webb and Taylor*, 1 T. B. Mon. 101.

Being no error prejudicial to the substantial rights of the appellant, the judgment is *affirmed*.

Kline & McCarty, J. G. Carlisle, for appellants.
E. W. Hawkins, for appellee.

T. P. RANKIN'S EX'RS *v.* THOMAS F. DAVIDSON.

Attorney's Lien for Fees.

Under the laws of Indiana an attorney may secure a lien on a judgment procured for his client by endorsing a notice thereof on the judgment when entered, and a resident of Kentucky, becoming a suitor in Indiana, must stand upon the same ground with a citizen of that state, so far as that litigation and its consequences are concerned.

Payment of Judgment.

Where a judgment is taken against a litigant, upon which judgment the attorney securing it has endorsed a lien as provided by the laws of Indiana, the judgment debtor who pays the judgment to his adversary, if the attorney be not paid, may have to pay the amount of such lien.

APPEAL FROM HARRISON CIRCUIT COURT.

October 4, 1879.

OPINION BY JUDGE COFER:

The appellants' testator having become a suitor in the courts of Indiana must stand upon the same ground with a citizen of that state, so far as that litigation and its consequences are concerned. He could not appeal to the laws of that state for a redress of his own grievance without at the same time subjecting himself to the obligations and burdens which the laws of the state impose upon its citizens similarly situated.

Under the statute an attorney had a right to a lien upon a judgment recovered for his client. That right might be perfected by an endorsement on the record made at the time the judgment was rendered. One of the purposes for which such endorsement was required, no doubt, was to give notice to the defendant that the attorney had a lien, and thus put him upon his guard not to satisfy the judgment to the plaintiff without satisfying the lien.

The endorsement was required to be made when the judgment was rendered. Every suitor in the courts of that state, whether residing

there or elsewhere, was bound to know that such was the law, and it thus became the testator's duty to ascertain before he paid the judgment whether a lien had been secured by Barnes' attorney. It does not matter that he may in fact have been ignorant of the existence of the lien, he had the means of informing himself, and it was his duty to inquire.

Suppose the law of that state had empowered the court to grant a new trial at a subsequent term, and the power had been exercised and a second trial had been had without the testator's knowledge, and a judgment rendered for a larger sum, would it have been any answer to a suit on that judgment in a Kentucky court that he did not know that such was the law, and had no actual notice that a new trial had been awarded?

Enlightened states generally give to foreign litigants the same remedies which they give to their own citizens or subjects, but we are not aware of any instance in which foreigners are accorded privileges or exemptions from the burdens incident to litigation which are denied to the citizens.

That the clerk made and Barnes filed in his suit on the judgment a transcript which purported to be a complete, but which it now turns out was incomplete, cannot effect the rights of the appellee. He is in no way responsible for the omissions of the clerk, or for the acts of Barnes. Nor can we hold that the appellee waived or abandoned his lien by failing to assert it at an earlier day. There is no statute of limitations that bars it, and mere passiveness for that period does not bring the case within the class denominated stale claims.

The judgment must be *affirmed*.

J. I. Ward, A. H. Ward, for appellants.

Thomas F. Davidson, C. W. West, for appellee.

BLAND BALLARD, ET AL., v. WILLIAM ST. CLOUD & COMPANY.

Dedication of Streets by Plat.

When the proprietor of land within the boundary of a city lays it out into lots and sells them, leaving intervening strips of land corresponding to established and improved streets, projecting toward them, it will amount to a dedication of such strips for public use as streets.

Acceptance of Dedicated Streets.

Where a proprietor has dedicated streets to the public by plat and selling lots, it is not required that the public shall be in actual occupation of such streets in order to show its acceptance of the dedication, but it is enough that the public has done that which its acceptance may be inferred.

APPEAL FROM LOUISVILLE CHANCERY COURT.

October 4, 1879.

OPINION BY JUDGE COFER:

We think the evidence sufficient to show that Second street is an established and recognized street as far south as Ormsby avenue at least, and that Oak and Ormsby, from Third to Second, are established streets, and consequently the lots of the appellee assessed for improving Third street, were embraced within a square bounded on all sides by principal streets.

The map indicates that the land within the lines of these streets had been laid off into lots of the usual size of city lots, and many of them had been sold. The deeds filed call for these streets in a manner to indicate that they were recognized by the proprietors as streets. They correspond with the streets already opened and improved, and unless these are streets then there are no streets provided for the accommodation of the owners of the lots laid off and sold.

When the proprietor of land within the boundary of a city divides it out into lots and sells, leaving intervening strips of land corresponding to established and improved streets, projecting toward them, this ought to be regarded, both upon principle and authority, as a dedication. It is true, some of the deeds are mere deeds of partition, but they are not on that account less persuasive that it was the intention of the proprietors to dedicate the streets.

The ordinance recognizes Third street as a public way, and the apportionment recognizes Second, Oak and Ormsby avenues as such. It is true that this is not sufficient, unless those streets existed when the ordinance was passed, and it affords some evidence conducing to prove that the streets existed previously, and, when considered in connection with the deeds and maps, is sufficient to make out the appellees' case.

That the streets opposite these lots have not been opened and improved is a fact tending to show that there has been

dedication. So, also, the fact that Third street has been opened and improved by the city without any question being made that it has not been dedicated, is evidence that all the streets laid out by the same proprietors as part of the same plan were also dedicated. And the improvement of Third street by the city is strong evidence that it has accepted all the streets laid out by the proprietors on the same piece of land.

It is not essential to a dedication that the public shall be in the actual occupation and use of streets. It is enough that the proprietor has dedicated them, and the public has done that from which its acceptance may be inferred. This completes the right of the public to the use which can be secured whenever the public convenience requires it.

The judgments must therefore be *affirmed*.

*Harrison & McGraw, Barr, Goodloe & Humphrey, for appellants.
Caldwell & Winston, for appellees.*

LOUISVILLE, CINCINNATI & LEXINGTON R. CO. v. S. A. RAMSEY.

Negligence.

Where stock are injured at a point where the railroad company was not required to fence its right-of-way or build cattle gaps, there can be no judgment against the company unless the stock was injured by reason of the negligence of the company.

Damages for Stock Killed by Railroad Company's Car.

Where stock killed was allowed to run in a pasture unfenced from the railroad track, and hence cattle gaps could have been of no service, it was error to permit evidence to go to the jury that no cattle gaps had been built. It was immaterial whether there were cattle gaps, unless it was the duty of the company to build them at that point.

APPEAL FROM CLARK COURT OF COMMON PLEAS.

October 4, 1879.

OPINION BY JUDGE HINES:

In view of the state of the pleadings the fifth instruction given by the court, authorizing the jury to find for appellee one-half the value of the stock killed and one-half of the damage sustained by reason of injury to stock not killed, was erroneous. The second paragraph of the petition was evidently intended by the pleader to be based upon Sec. 2, Chap. 57, General Statutes, but he failed to

allege that appellant had not received compensation for fencing his land along the line of the railroad, and this defect was not cured by the answer, and therefore no issue was presented upon this point to authorize such an instruction or the introduction of this evidence to the effect that compensation had not been received.

The evidence strongly tended to show that appellant, in the running and management of its train, was not guilty of negligence, and the jury may well have so concluded, yet they were constrained, under the instruction mentioned, to find for appellee. Under the pleadings no judgment was authorized without appellant was found to be guilty of negligence. The instruction was clearly misleading and detrimental to the substantial rights of appellant.

In view of the fact that the evidence conclusively shows that the stock killed and injured were allowed to run in a pasture unfenced from the road, and that cattle-gaps could have been of no service in protecting them from injury, it was error to permit evidence to go to the jury that no cattle-gaps had been built. It is immaterial whether there were cattle-gaps, unless it was appellant's duty to build them at that point, and the failure to build them resulted in or was to some extent the cause of the injury sustained.

The instructions given by the court, with the exception of number five, presented the law of the case to the jury with sufficient clearness. We think the court did not err in refusing the instruction asked for by the appellant. It does not matter whether the stock were actually struck by the engine or cars, if by reason of the negligent handling of the train they were caused to fall and injure themselves.

Judgment is *reversed* and cause remanded with directions to grant appellant a new trial.

G. B. Nelson, A. Barnett, for appellant.

W. M. Beckner, for appellee.

J. W. COLLINS *v.* A. R. GARDNER.

Conveyance by Wife.

The attestation clause of a deed adds nothing to its force, and the recital in a deed that a married woman is a party to a conveyance where the deed purports to be a conveyance by the husband alone, is contradicted by the face of the deed, and it must be treated as if she merely had signed it without any mention of her name in its body.

Estoppel of Married Woman.

During the life of her husband a woman is under disability to assert her rights by suit, and the law which disables her to sue cannot require her to give notice of her claim on pain of losing her right through the operation of an estoppel.

APPEAL FROM WARREN CIRCUIT COURT.

October 7, 1879.

OPINION BY JUDGE COFFER:

The attestation clause of the deed of Gardner and wife adds nothing to its force. The recital that she is a party to the conveyance is contradicted by the face of the deed, and it must be treated as if she merely had signed it without any mention of her name in its body. It purports to be a conveyance by the husband alone, and comes within the rule in *Prather v. McDowell and Wife*, 8 Bush 46, and other cases decided by this court.

Nor is Mrs. Gardner estopped by any act or omission proved in the record. During the life of her husband she was under disability to assert her rights by suit, and the law which disabled her to sue could not consistently require her to give notice of her claim on pain of losing her right through the operation of an estoppel.

The appellant has been allowed the full increased value of the land resulting from the improvements, and being paid for the improvements it was proper he should be required to pay rent since the death of Asa B. Gardner.

The judgment was as favorable to the appellant as the law warranted, and must be *affirmed*.

J. M. Tyler for appellant. Halsell & Mitchell, for appellee.

LAURA MALONE, ET AL. v. R. W. RAY'S EX'R.**Advancements.**

An ancestor can neither charge that as an advancement which in law is not an advancement, nor exempt a descendant from being charged with that which in law is an advancement, except by disposing of his entire estate leaving nothing upon which the court can operate to secure equality among his representatives.

APPEAL FROM MARION COURT OF COMMON PLEAS.

October 11, 1879.

OPINION BY JUDGE COFER:

It was settled by the former opinion that Mrs. Malor chargeable with the \$800 mentioned in the deed from her. But it is insisted that, as she is charged in the will with that sum because the will says she was rightly charged with that sum because the will says so, and that this aspect of the question was not before the court in the former appeal. We incline to the opinion that in this case the court is in error, but waiving that question, we are of the opinion that the will and all the facts now in the record before us, show she is chargeable with more than \$1,600 as advancements.

Whether a given thing was an advancement was formerly a question with the ancestor, but it is now matter of law, and finally it is now wholly immaterial whether the ancestor designated a particular item to be charged as an advancement or not, for the court will look at the facts and decide whether there has been an advancement, and the amount to be charged to the descendants is the amount of advancements made.

It has been held that an ancestor can neither charge a descendant with an advancement which in law is not an advancement, nor can a descendant from being charged with that which is in law an advancement, except by disposing of his whole estate so as to leave nothing upon which the court can operate to secure equality among the representatives. *Clarke v. Clark*, 17 B. Mon. 698; *Ford v. Ford*, 1 Met. 580; *Bowles v. Winchester*, 13 Bush 1.

The facts in the record show that the \$800 intended to be advanced in the land are included in the \$2,400, with which the will directed Mrs. Malone to be charged. She did not get that sum, consequently it appears that she only received \$1,600 of the \$2,400. Again, as it appears that the \$800 given in the will is included in the sum mentioned in the will as having been advanced to her, she would be entitled to that sum out of the proceeds of the land if she was charged with it as an advancement. If the estate is solvent it is immaterial in what way the result is reached. Whether she be charged with the \$800 as an advancement or not, the whole proceeds of the land goes to the fund for distribution. If she receives the advancement out of the land, can make no difference. But it is perhaps the more consistent with legal principle to reject so much of the advancement charged in the will as she did not receive and to allow the whole proceeds of the land to be distributed under the will.

In either view the court erred, and the judgment must be reversed and the cause remanded with directions to charge Mrs. Malone with only \$1,600 as an advancement. No cross-appeal has been prosecuted, and we cannot consider the question whether the matter of rents and improvements was properly disposed of.

Russell & Arritt, for appellants.

R. H. Rountree, J. P. Thompson, for appellee.

D. SMITH, *alias* PRATHER, v. COMMONWEALTH.

Criminal Law—Forgery.

An allegation in an indictment that the accused falsely and fraudulently forged the name of a given person by signing his name to a certain paper, is not good. The charge should show that the name was signed by the accused without the knowledge, consent or authority of the person whose name was used.

APPEAL FROM GARRARD CIRCUIT COURT.

October 14, 1879.

OPINION BY JUDGE HINES:

The allegation in the indictment that appellant falsely and fraudulently "forged" the name of Rus Harris, by signing his name to a certain paper, is not good. This is only the statement of a legal conclusion, and is not a compliance with the requirements of the Code that the acts constituting the offense shall be stated in ordinary language, etc. It is not enough that it may be inferentially determined from the charge in the indictment that the name of Rus Harris was signed by appellant to the writing without the knowledge, consent or authority of Harris. The fact must be specifically alleged. *Stowers v. Commonwealth*, 12 Bush 342; *Commonwealth v. Williams*, 13 Bush 267. For the reason indicated the indictment is fatally defective, and the court should have sustained the demurrer.

Judgment *reversed* and cause remanded with directions for further proceedings consistent with this opinion.

Walton & Kauffman, for appellant. Hardin, for appellee.

ZACK DESKINS *v.* COMMONWEALTH.**Criminal Law—Self-Defense.**

What a man in peril of his life or great personal injury fully do in his own self-defense, another person may do for him.

Instruction.

It is error in a murder trial for the court to charge that if one did the killing without malice aforethought and in self-defense, and yet if the jury believe from the evidence that another who was present but did not do the killing, but who with the accused thought feloniously and wilfully and not in his own defense, knowing the intention of the one doing the killing, aided or advised the killing, it should find him guilty of wilful murder and fix his punishment at death or life imprisonment.

APPEAL FROM PIKE CRIMINAL COURT.

October 14, 1879.

OPINION BY JUDGE HINES:

Among the many errors complained of in this case is that of the following instruction: "Although the jury may find from the evidence that Mont Deskins did the killing with malice aforethought, and further find that he did so in his necessary self-defense, yet if the jury should find from the evidence that the accused, of his malice aforethought, feloniously aided and not in his necessary or apparently necessary self-defense, knowing the intent, at the time, of Mont Deskins to kill, and aid, counsel or advise the killing, and was there for that purpose, they will find him guilty of wilful murder and fix his punishment at death, or the jury may fix his punishment at confinement in the penitentiary at hard labor for and during his natural life."

Under this instruction appellant was convicted and sentenced to the penitentiary for twenty-one years. The effect of the instruction is to tell the jury that although Mont Deskins was justified on the ground of self-defense, in killing Goff, yet if appellant was aiding and abetting Mont Deskins in the preservation of his life at the hands of Goff, he, appellant, is guilty of murder. This is clearly erroneous. The rule is, that which a man in peril of his life or great personal injury may lawfully do in his own self-defense, another person may lawfully do for him; and this rule is applied to persons occupying the relation of parent and child.

and servant. *Roberts v. Commonwealth*, Mss. Op. 1876. *Wharton on Criminal Law*, sec. 1019.

Judgment *reversed* and cause remanded with directions for further proceedings consistent with this opinion.

R. T. Burns, Geo. N. Brown, for appellant. Hardin, for appellee.

N. H. BIGHAM, ET AL., v. BLOUNT HODGE'S EX'R, ET AL.

Statute of Limitations as to Trustee.

Where one is trustee for another under the terms of a will, which trust is to terminate at the death of a named person, upon her death the trust terminates, and it becomes his duty to turn over to those entitled thereto the remainder of the estate; and he is in no sense a trustee of a continuing trust as to those entitled to the estate, and hence the statute of limitations begins to run as to their claims against him from the death of the beneficiary of his trust, and their claims will be barred unless asserted within the time named by the statute.

APPEAL FROM LIVINGSTON COURT OF COMMON PLEAS.

October 14, 1879.

OPINION BY JUDGE COFER:

The last will and testament of Robert C. Bigham contains the following clause, viz.: "I give and bequeath unto my beloved wife, Betsey, one-third of all my estate, both real and personal, to be controlled and managed by her during her life or widowhood, but if she should again marry, in that case I wish all the estate hereby willed to her to vest in the hands of a trustee, to be hereafter selected and appointed for that object by the county court of Livingston, or by the circuit court of said county, as may be most proper or convenient, and by him to be disposed of, in point of use, in such manner as he may think most profitable and advisable, and the proceeds thereof to inure to my said wife, to be enjoyed by her during her life, and at her death to descend to her now children and such others as she may have, if any, in equal proportions; my object in this is to secure to her, my said wife, the full and entire benefit of that portion of my estate hereinbefore bequeathed to her in case she should be so unfortunate as to inter-marry with some man who might not be disposed, or who might not be able to afford her the full and entire benefit of the same, and in order to prevent any other from the final disposal of the same."

The will was probated in 1832. In 1834 the widow of the testator married Blount Hodge and remained his wife until her death in 1864. No trustee was appointed as directed by the will. Hodge received whatever was coming to his wife under the will of her former husband, and died in 1877 without having in any way accounted to her children or their descendants for the money and property so received, and in August, 1877, they brought this suit against his executor to recover the same.

They sought to hold him responsible as a voluntary trustee. The executor, among other defenses, pleaded the statute of limitations. If, assuming that Hodge was a trustee as claimed, the statute presents a bar to the recovery sought, it will be unnecessary to state or consider the other grounds of defense relied upon.

The trust created by the will was primarily for the benefit of the testator's widow. The money and property were to be held by the trustee and the income appropriated for her benefit during her life, and at her death the principal was directed "to descend to" *i. e.*, to be divided between her children in being at the testator's death, and such others as might thereafter be born to her, in equal proportions.

Sec. 20, Art. 4, Chap. 63, Revised Statutes, in force at the time of the death of Mrs. Hodge, provided that the statute of limitations should not apply to a case of a continuing and subsisting trust.

The will made it the duty of the trustee to pay over to the children of Mrs. Hodge the fund held by him immediately after her death. After that event he had no duty to perform which was in its nature continuing and subsisting. It was not his duty to hold the fund for the children and his wife. His duty and only duty was to pay it over to them, and they might at any time thereafter have maintained an action to compel him to do so.

The principal purpose for which the trust was created was there fully accomplished. The only remaining duty of the trustee was to pay the money and deliver the property constituting the trust estate to those entitled to it under the will. He no longer held under the trust, but in direct violation of its terms. Can he then be said to have been the trustee of a continuing and subsisting trust after the death of his wife? We think not.

This suit was commenced to compel his executor to do that which the will of Bigbam made it the duty of Hodge to do more than thirteen years before the suit was brought, and after all his duties as

trustee, except the duty to pay the fund to those entitled, had been performed. There being no continuing and subsisting trust, the statute exempting such trusts from the operation of the act of limitations does not apply.

The trust was by its own terms to terminate at the death of Mrs. Hodge, and on the happening of that event her children not only became entitled to demand the money in the hands of the trustee, but the legal title to the property, if any remained in specie, vested in them by operation of law, leaving Blount Hodge in the position of a mere bailee of the property and debtor for the money in his hands. *Thomas v. Harkness and Wife*, 13 Bush 23.

If the statute did not run from the death of Mrs. Hodge it has not yet commenced, and it is impossible to say when it will begin to run. There is some evidence conducing to prove that Hodge acknowledged the trust as late as February, 1873, but that evidence is entirely too vague and indefinite to take the case out of the statute.

One of Mrs. Hodge's sons by her first husband died in 1863, leaving a widow and several children. He appointed his widow executrix of his will, and she qualified as such and died before this suit was commenced, and the suit for his share was prosecuted in the name of his infant children. It is claimed that their infancy prevented the running of the statute.

It is conceded on all hands that the children of Mrs. Hodge, in being when her husband Bigham, died, took a vested interest in the trust fund. That interest upon the death of the father of these infant plaintiffs passed to his personal representative, and not to them, and they had no right of action to recover it. But waiving this and assuming that they could be permitted to sue, they may do so as substitutes for the personal representative, and as he would be barred they are barred also.

Wherefore the judgment is *affirmed*.

William Lindsay, Bush, Hendrick & Piles, W. P. Fowler, J. W. Blue, N. H. Bigham, W. D. Greer, for appellants.
S. Marble & Son, for appellees.

FRANK M. LAWRENCE, ET AL., v. GEORGE B. LAWRENCE'S
ADM'R, ET AL.

Homestead Right.

Where several children are entitled to a homestead a creditor cannot complain because those arriving at twenty-one years of age remain in the homestead with a younger child.

Judgment and Sale, Affect on Homestead.

The judgment of sale, the confirmation, deed and distribution of the money do not estop or preclude the infant children of the husband from claiming a homestead in his real estate.

Waiver of Homestead Claim.

There can be no waiver of a homestead by a husband except in the mode provided by the statute, and there being no statute by which infants can waive the homestead they have no right.

APPEAL FROM McCracken COURT OF COMMON PLEAS

October 15, 1879.

OPINION BY JUDGE HARGIS:

There is no question raised in the record between the husband and illegitimate children of the husband, and that question is now to be considered.

As Frank M. Lawrence is the youngest of the appellants, and he has shown himself entitled to homestead, the use of which is to remain to him until he arrives at the age of twenty-one years, and the judgment is neither an injury to appellees nor any right they have to the property, the court's judgment, declaring in effect that the appellant, Wm. A. Lawrence, cannot occupy and enjoy the use of the homestead with his brother, Frank M. Lawrence. That may be a matter of grace or contract upon which the court has no jurisdiction, and it was erroneous to disturb or attempt to limit his right to the use of the homestead with his natural brother at the expense of the appellees, who had no interest in that question.

The judgment of sale, the confirmation, deed, and distribution of the money do not estop or preclude the infant children of the husband from claiming a homestead in his real property.

In the case of *Wing v. Hayden*, 10 Bush 276, it is held that the act of 1876, which gave to all persons entitled to the benefit of the act its effect, was to take away from all courts the power to sell the homestead under the judgment for the sale of and in which the owner has a right to the property, and the homestead exemption, and a sale under it cannot divest the homestead unless the right to exemption has been waived in the mode provided for by the statute. The sale simply invests the purchaser with the title subject to the exemption."

Sec. 14, Chap. 38, General Statutes, in the last clause provides that the "land may be sold subject to the right of said wife and children, if a sale is necessary to pay the debts of the husband."

The appellant, Frank M. Lawrence, without doubt is entitled to the benefit of the act, and the court had no power to sell the homestead from him. There can be no waiver by the husband and wife except in the mode pointed out by the statute, which omits to provide any mode by which infants can waive the homestead. And by not providing a mode for waiver by them as is done in the case of husband and wife, we must presume that the legislature thereby intended to forbid waiver by infants as a protection to them. And as they are supposed in law not to be competent to engage in such transactions, this must have been the reason for the omission. Upon careful consideration of the question we are of opinion that the money paid by appellee, commissioner, to the court's commissioner, and distributed to the creditors, should not be restored to him, because he is presumed to have purchased the title of the house and lot subject to the exemption to which appellant, Frank M. Lawrence, is entitled. *Wing v. Hayden*, 10 Bush 276.

Wherefore the judgment is *reversed* and cause remanded for further proceedings consistent with this opinion.

W. G. Bullitt, Houston & Houston, for appellants.

L. D. Husbands, for appellees.

JOHN E. HAMILTON'S ASSIGNEE v. JOHN P. WINSTON, ET AL.

JOHN P. WINSTON v. JOHN E. HAMILTON, ET AL.

Evidence of Delivery of Deed.

The acknowledgment and recording of a deed by the grantor constitutes strong evidence of a delivery of the deed.

Presumption—Burden of Proof.

The presumption of delivery of a deed arising from its acknowledgement and recording, casts the burden of disproving its delivery upon the party claiming its non-delivery.

Relationship as Evidence of Fraud.

The relationship between the parties when proven is of little value as evidence of fraud in a transaction.

APPEAL FROM KENTON CIRCUIT COURT.

October 18, 1879.

OPINION BY JUDGE COFER :

These appeals will be disposed of together, and as if the appeal of Hamilton's assignee had not been previously considered.

There are two principal questions, viz.: 1. Was the deed delivered to Winston? 2. Was it fraudulent as to Winston's creditors?

The deed has been acknowledged and recorded. Winston testifies that he had it recorded merely for the purpose of putting himself in a position to be able to comply with his contract with Winston and not as his agent, and that he did not deliver it until Winston should execute to him a deed to reconvey one-half of the land to him.

There is some evidence corroborating each party, but the preponderance is in favor of Winston. The acknowledgment and recording of the deed by Hamilton constitutes strong evidence of delivery; and when considered in connection with the testimony of Winston, and the fact that he seems to have exercised control over the land after the date of the deed, leasing parts of it in his name for several years without, so far as appears, consultation on the subject, and without complaint from him, satisfactorily shows that the deed was in fact delivered.

This case is wholly unlike that of *Thompson v. Jackson Co.*, 14 B. Mon. 114. It appeared in that case that the grantee was not apprised of the execution of the deed, and it did not appear that it was made pursuant to an antecedent contract between the grantor and the grantee; and because of these facts it was held that the ordinary presumption that a grantee does accept a conveyance for his advantage did not apply.

The deed in question here was made in pursuance to an agreement antecedently made between the parties, and the ordinary presumption of delivery from the acknowledgment and recording of the deed cast the burden of disproving the delivery upon Hamilton; and treating Hamilton and Winston as equally credible, we can reach no other conclusion than that the deed was delivered.

There is no sufficient evidence of a fraudulent purpose on the part of either in the execution of the deed. The only evidence tending in a remote degree to prove fraud is the alleged increase in price, the statement in Winston's answer that he was convinced that Hamilton must shortly fail, and the relation existing between them. There is much conflicting evidence as to the value of the land at the time. The evidence, as far as it consists of the mere

witnesses, conduces to prove it was worth considerably more than the price Winston agreed to pay for it.

But we regard the fact that Hamilton purchased it for himself and Gates at \$32.50 per acre, and that Gates sold his part for an advance of only \$450, or \$2.25 per acre, is entitled to much more weight in fixing the real value of the land than the parol evidence. It is true that it is shown that the former owners were anxious to sell, and were willing to submit to a sacrifice in order to realize upon it at once, but it is incredible that in the then state of the money market land situated as this is should have been sold for \$32.50 per acre when it was worth \$75 or \$100, or even \$50 per acre.

There is no evidence that Gates was so pressed as to be compelled to sell. True, he did not have the money to meet his part of the draft upon which the purchase money was borrowed. But there is no evidence that he could not have borrowed it as Hamilton did, and if the land was worth even \$50 per acre it is not at all probable that he would have been unable either to borrow the money or to sell his interest for greatly more than he got for it.

The statement in the answer that Winston apprehended that Hamilton would shortly fail, when taken in connection with the fact that he was Hamilton's surety for \$18,000 or \$20,000, may tend to prove that Winston was seeking security against that liability, but is entitled to but very little weight as tending to prove an actually fraudulent intention.

The relationship between the parties is also of little value as evidence of fraud in fact. It should induce the court to scrutinize closely the other evidence of fraud, but unless such other evidence is greatly stronger than in this case, mere relationship between the parties cannot avail.

It must be remembered that Winston undertook to pay cash just as Hamilton had done, and that Hamilton admits that he was "hard run," and largely involved in debt, though there is nothing in the evidence except his bankruptcy, nearly four years after the date of the deed to Winston, indicating that he was then insolvent, or that either he or Winston supposed he was, or would shortly become so.

Waiving the question whether a federal statute of limitations can be interposed to bar an action prosecuted in a state court, we are of the opinion that the action by Winston is not barred by the limitation prescribed in the bankrupt act, even if it can be pleaded here.

We have already decided that Winston became the owner of the

land under the deed from Hamilton. Hamilton continued in possession of the $7\frac{1}{2}$ acres, recognizing Winston as the owner of one-half of the entire tract. He only claimed to be a co-tenant with Winston, and in his schedule recognized that relation. Yet though not Winston's tenant, he owed him allegiance, and his holding was amicable in the absence of anything to change that relation, and the mere assignment to the assignee without notice to Winston, or any such open and notorious act as indicated that he was holding adversely did not work to put the statute of limitation running against him.

Wherefore the judgment is *affirmed* on the appeal of Lewis, assignee of Hamilton, and *reversed* on the appeal of Winston, and the cause is remanded with directions to render judgment in his favor for the recovery of the $7\frac{1}{2}$ acres of land sued for.

Benton & Benton, for Winston, et al.

McKee & Finnell, for Hamilton's Assignee.

W. W. Clary, for John E. Hamilton, et al.

ALEX SAYERS *v.* STONER & ROBY.

Damages Caused by Negligence.

Where a fact in issue depends for its establishment upon the opinions of witnesses, its decision by the jury will not be disturbed by the court.

Damages Too Low.

When in a suit for damages against one for negligently operating a threshing machine so that fire escaped from the machinery and destroyed plaintiff's grain, and the quantity of the grain destroyed is not proven by measurement or the actual knowledge of witnesses, but by their opinions of the quantity of grain the destroyed ricks would yield, the jury have the right to test the accuracy of the testimony by their own intelligence on such matters, and having arrived at a verdict it will not be set aside because claimed to be for too small amount of damages.

APPEAL FROM NELSON CIRCUIT COURT.

October 20, 1879.

OPINION BY JUDGE HARGIS:

While the appellees were threshing oats for appellant the ricks caught fire from the sparks emitted from the smoke pipe of the engine attached to the thresher and were consumed. The appellant

instituted his suit for \$500 damages against them, charging that appellees were guilty of negligence. The jury, under the instructions of the court, returned a verdict for \$50 damages, and appellant has brought this appeal to reverse the judgment on that verdict on the ground that the assessment was too small.

The appellees insist that there should have been no verdict for any sum against them, and that therefore the judgment should not be disturbed. The record shows that the testimony of several witnesses was erroneously admitted at the instance of the appellant, and against the objections of appellees, tending to prove that they had been guilty of negligence in threshing the grain of other persons on different occasions.

Besides this, the court, on appellant's motion, erroneously instructed the jury that if appellees were guilty of negligence, without qualifying its degree, in the construction or management of their steam engine or thresher, they should find for plaintiff. And it may be that the jury would not have found for appellant at all but for the influence of the cited errors committed by the court in his favor. Yet, if the jury were not so influenced in making up their verdict can it be disturbed on the ground that it was too small?

The general rule is that where a fact in issue depends, for its establishment, upon the opinions of witnesses, its decision by the jury ought not to be disturbed by the court. *Salmons v. Webb*, 12 B. Mon. 365. Here the quantity of oats destroyed by the fire was not proven by measurement, nor the actual knowledge of the witnesses, but by their opinions of the quantity the ricks would yield. The value of the oats was sought to be established by proof of their market-price per bushel. The jury, in making up their verdict as to the value or quantity in such cases, have a right to test the accuracy of the testimony, to some extent at least, by their own intelligence on such matters. For instance, if the witnesses had each sworn that the ricks of oats thirty-two feet long each contained five thousand bushels the jury would have had the right to reject the estimate and make a verdict upon their own general knowledge of such things. It is true the jury have no right to substitute their general knowledge of common things for the non-conflicting opinions of witnesses on subjects about which the opinion of witnesses can be legally taken, but in order to set aside a verdict wholly or partially against the opinions of witnesses the verdict must violate the evidence and

all reasonable calculations which might be deduced from *mateer v. Stout's Adm'r*, 5 J. J. Marsh. 51.

Judgment affirmed.

Muir & Wickliffe, for appellant. Wm. Johnson, for a

HENRY FIELD'S HEIRS, ET AL., *v.* HIRAM KLETE, ET

LEWIS THOMPSON, ET AL., *v.* JAMES ARMSTRONG, ET

No Estoppel by Purchase of Adverse Title.

When a party in possession claiming land as his own recognizes an outstanding title, he will not be estopped to title under which he entered against the other unless he doned his possession under the title under which he en

Disability of Married Woman.

One holding real estate under an executed contract hold to his vendor, and this is as true where the grantor is woman as where she is not.

Statute of Limitations.

When the statute of limitations has begun to run again her subsequent marriage will not arrest its running, the that if limitation begins to run its running will not be su a subsequent disability which is self-imposed.

APPEAL FROM KENTON CIRCUIT COURT.

October 21, 1879.

OPINION BY JUDGE COFER:

There was evidence conducing to prove that Hiram Fred Klete, under whom he claims, were in possession of the land in contest as early as 1818, and were leasing portions of it as their own. Fred Klete devised portion his will dated in 1833. He died in 1834. The prices paid of Field's devisees who conveyed their interests indicated title was then regarded as of but little value, and in connection the great lapse of time between those purchases and these tifies the conclusion that the purchases were made to pro session and claim previously held.

Being in the previous possession of the land, claiming it to Field's devisees, the purchases and conveyances from not have the effect of converting their previous hostile

into an amicable possession, or to make their subsequent holding inure to the benefit of such of Field's devisees as they did not purchase from.

The rule upon this subject seems to be that where a party in possession claiming land as his own buys or recognizes an outstanding title he will not be estopped to set up the title under which he entered against the other unless he has abandoned his possession under the title under which he entered. *Ray v. Barker's Heirs*, 1 B. Mon. 364.

Klete and Reeder, so far from abandoning their previous possession and claim of title after they purchased the title of a part of the devisees of Henry Field, Jr., and holding only under their title, continued by the most unequivocal acts to assert title to the whole land. They not only made mutual deeds in 1840, by which each conveyed to the other an undivided half of the whole land, but both before and after that time they sold and conveyed distinct parcels in a manner that plainly and unmistakably evinced their claim to the whole and that they not only did not recognize the right of the other devisees to any interest in the land, but that they claimed to own the whole of it.

Their acts in selling, conveying and leasing as the owners of the whole were open and continued for a time so great that even if they had entered under Field's title it is doubtful whether the appellants could have recovered. But as Klete and Reeder did not enter under their title, but entered and held possession, and claimed the land prior to the acquiring any part of the Field title, and never abandoned their previous possession and claim, their possession continued to be adverse, as it was before the purchases and conveyances.

This is as true as to Mrs. Hawkins and her representatives as it is as to those who made no conveyance. Klete and Reeder did not enter under her. When they purchased from her they were in possession claiming adversely to her, and limitation had commenced to run, if the bar was not already complete; and the deed did not arrest the running of limitation against her, nor did the holding, which was previously adverse, become amicable as to her. On the contrary, if the holding had been amicable previous to the execution of the deed it would thereafter have been adverse. True, she would not have been barred by such holding if it had commenced at the date of her deed, not, however, because the holding would not have been adverse, but because being a married woman she would have been

within a saving in the law of limitation which prevented the bar from becoming complete, although the possession was adverse.

The rule that one holding under an executed contract holds adversely to his vendor applies as well where the grantor is a married woman as where the grantor is *sui juris*. The reason why the right is barred in the one case when it is not in the other grows out of the fact that one is under legal disability to sue, while the other is not, and not because the possession is amicable in the one case and adverse in the other.

Mrs. Hawkins' right of action accrued when there was a hostile entry upon her land, and no new cause of action accrued to her at or after the execution of the deed. She is not shown to have been under any disability when Klete and Reeder, or those under whom they claim, entered, and consequently limitation then commenced to run against her, and was not arrested by her subsequent marriage or by the deed of 1846, the rule being that if limitation begins to run its running will not be suspended by a subsequent disability which is self-imposed.

But there is a still more formidable obstacle in the path of her representatives. Their action as originally commenced was in the nature of an action of ejectment. By a consent order entered October 5, 1866, it was agreed that the actions of *Delany v. Klete* and *Thompson v. Armstrong* should be consolidated, and that the petition in the latter case should be so amended as to ask for partition. The record before us does not show that any such amendment was ever filed. The consent order was an abandonment of the original action, and whether so or not there was no pleading on which partition could have been adjudged in favor of the plaintiffs in that case.

Again, the clerk does not certify that the transcript is complete. He says it is complete, "except some plats, exhibits and pleadings in the case of *Thompson v. Armstrong*, consolidated with the cases therein mentioned, said pleadings being the same in substance as in the case of Field's heirs." The code in force when these appeals were filed required a complete transcript, and did not authorize this court to consider a partial record. The original plats have been filed and are before us, but the pleadings and exhibits not copied are not before us, and if there was no other reason for so doing, the judg-

ment in the case of *Thompson v. Armstrong* would have to be affirmed because the record is not complete.

Judgment affirmed.

Pryor & Chambers, J. E. Hamilton, for appellants.

J. W. Stevenson, for appellees.

ADAMS & BENDIX v. H. S. BUCKNER, ET AL.

Bankruptcy Proceedings.

Where one causes himself to be forced into bankruptcy and conceals the transfers and payments he had made, and the jurisdiction of the bankruptcy court having been made impotent by he who invokes its powers, under the pretense of an equal distribution of his estate, such jurisdiction cannot be interposed to an action in the state courts to compel such distribution under a statute whose provisions are unknown to and not in conflict with federal jurisdiction.

Remedy for Fraud.

Where a party commits a fraud and has concealed it to prevent the enforcement of a remedy, the remedy stands unaffected by the fraud, as if it had not been committed and no one deceived by it.

APPEAL FROM LOUISVILLE CHANCERY COURT.

October 23, 1879.

OPINION BY JUDGE HARGIS:

The petition of appellants contains every allegation required by the statute of 1856, to constitute a cause of action against the appellees. And in order to avoid the action the appellees aver that the debtor, Buckner, had become an involuntary bankrupt on the petition of appellants and others; that they had proven the claim sued for in the bankrupt proceedings against Buckner; that the appellants, therefore, could not maintain their action, and the state court had no jurisdiction. The appellants, after their demurrer was overruled, replied and admitted the averments of fact relative to the bankrupt proceedings contained in the separate answers of appellees, which are in substance alike. But they plead in avoidance thereof that the transfer and payment by Buckner to his co-appellees, Weller and Gaertner, were fraudulently made and concealed from appellants and other creditors by appellee, Buckner, with the view to have the statute of limitations in bankruptcy bar any right or cause of action against Weller and Gaertner that might be brought to avoid the

transfers made to them; that Buckner had employed the device of proposing a composition settlement and postponing no intention of making it until the statute was complete, abandoned his proposed settlement so as to force his creditors to institute proceedings to have him adjudged a bankrupt; that he and Gaertner were privy to the acts of Buckner in concealing the transfer and payment, and in the proposed composition, conspired and confederated with him to consummate the fraud, though they were not aware of the transfer and payment, by reason of the acts of appellees, until four months had elapsed after the transfer was made.

The state of facts set forth in the reply by appellants is sufficient, if true, to avoid the effect of either joining in the petition or proving their claim against the bankrupt, both of which were caused by the act of appellees. The transfer to Weller and assignment to Gaertner operated as an assignment of the notes and property from Buckner to the creditors of the latter. And his assignment in bankruptcy has no interest in that property except "the right to the surplus that may remain after satisfying all debts and claims which are presented and 'provable under the statute against the bankrupt's estate.'" This rule, of course, as to the surplus, does not mean that the assignee is or will be entitled to it in all cases, but that the assignee is entitled to any right it is to the surplus. *Lincoln v. Fenley*, 11 Bush 131; *Bank of America v. Second National Bank*, Mss. Op., January, 1877.

If Buckner had not caused himself to be apparently forced into bankruptcy and had not concealed the transfers and payments which he had made, the appellants, according to the facts set forth in the reply, would not have joined in the petition or proved their claim against the bankrupt. And they ought not to be prejudiced by doing so, in view of the state of case presented by their reply, which the demurrer is to be true.

Their action in the bankruptcy proceedings should be sustained, if they had taken none. It is contended that as the district court of the United States has jurisdiction "of all matters and proceedings in bankruptcy," that it necessarily follows that the persons and property in question in the subject-matter before us are within the exclusive jurisdiction of that court. But the reply discloses a state of facts which shows that the assignee in bankruptcy cannot recover the transfer and payment made by Buckner to his co-appellees, because of the statute.

tations, and that the appellants have a cause of action beyond and not inconsistent with the powers of the district court, whose jurisdiction was not sought until the secret and concealed transfer and payment were beyond its control. That jurisdiction, having been made impotent by him who invokes its powers under the pretense of an equal and lawful distribution of his estate, cannot be successfully interposed to an action in the state courts, to compel such distribution under a statute whose provisions are unknown to and not in conflict with federal legislation or jurisdiction.

It is suggested by counsel that the assignee can bring suit for "all the property conveyed by the bankrupt in fraud of his creditors," and that the facts averred in the reply constitute a fraud and demonstrate that the assignee has a cause of action for the transfer and payment to Weller and Gaertner. But we do not so understand the reply, which, when taken in connection with appellant's petition, does not charge that the transfer and payment were actually fraudulent, but made in contemplation of insolvency with a design on the part of appellee, Buckner, to prefer the appellees, Weller and Gaertner, in exclusion of other creditors, and that they knew he was insolvent when he did so. These allegations are all that Art. 2, Chap. 44, General Statutes, requires to be made to bring the cause within its provisions. *Millett v. Pottinger*, 4 Met. 213; *Givens, Haynes & Co. v. Gordon*, 3 Met. 538.

There is no allegation that appellees, Weller and Gaertner, knew that the transfer and payment, or either of them, was made in fraud of the provisions of the bankrupt law. And there must be something more than mere knowledge of the insolvency of the debtor on the part of the transferee to bring the act within the inhibition of Sec. 5128 of the Revised Statutes of the United States as amended. It must be alleged and proven that the transfer was made "in fraud of the provisions" of the bankrupt law, knowledge of the insolvency being a relevant fact on such an issue. The fraud averred in appellant's reply is not charged to have been committed by the act of making the transfer or payment, but in concealing that act from them until federal limitation barred the assignees in bankruptcy. and they were deceived into going in the petition and making proof of their claim. The sole object of the averments of fraud by the appellants must have been to avoid the acts fraudulently procured by the appellee, Buckner, to be made in the bankruptcy proceedings.

Where a party commits a fraud and has concealed it to prevent

the enforcement of a remedy, the remedy stands unaffected by fraud, as if it had not been committed and no one deceived. The allegations by appellees that the transfer was to pay the debt is met by a denial, and the proof must be heard to settle the question of fact.

Wherefore the judgment is *reversed* and cause remanded with further proceedings not inconsistent with this opinion.

W. O. & J. L. Dodd, George Sherrin, for appellants.

L. M. Dembits, P. A. Gaertner, for appellees.

R. SUTHY & COMPANY *v.* C. M. MURPHY, ET AL.

Fraud Upon Creditors.

Where real estate is purchased by a debtor and conveyed to his wife, to the extent of the money paid for such property by the debtor, it is a legal fraud upon his creditors, for which they have a lien.

APPEAL FROM DAVIESS CIRCUIT COURT.

October 23, 1879.

OPINION BY JUDGE COFER:

It is alleged that the judgment, satisfaction of which is sought in this action, was rendered at the February term, 1877, by the Daviess Circuit Court; that the deposit bank recovered judgment for the purchase-money notes at the February term, 1871, and that C. M. Murphy has paid thereon since that time the sum of \$610. The averments are sufficient to show that the appellant's debt was created before this latter sum was paid, and as it was the money of which they complain, and which was the subject of the jury to them, the petition is sufficient as to all the money claimed. The judgment in favor of the bank, though we incline to think that the averment is not sufficient to show that the debt was in existence prior to the execution of the deed, and consequently that the payment is sufficient to reach the \$250 payment then made, even though made with money belonging to the husband. But as it is not sufficient as to all subsequent payments we proceed to inquire whether any of them were fraudulent as to the appellants.

In *Crosier v. Young*, 3 T. B. Mon. 157, and *Doyle v. Sherrin*, 1 Ala. 531, it was held that a conveyance made by a debtor to a person of property paid for by the debtor was not within

ute. But the statute did not then contain any provision similar to that in Secs. 20 and 21, Chap. 80, Rev. Stat., the latter of which declares that if a deed be made to one person and the consideration be paid by another such deed shall be deemed fraudulent as to the existing debts and liabilities of the person paying the consideration.

Marshall v. Marshall, 2 Bush 415, was decided since the adoption of the Revised Statutes, and intimates that the rule laid down in *Crozier v. Young*, and *Doyle v. Sleeper and Alsop*, *supra*, was still the law, but the question was not necessary to the decision of the case, and the statute to which we have referred was not alluded to.

In the recent case of *Marchand v. Sublett*, Mss. Op., we have decided that the statute has changed the rule, and that *Crozier v. Young* and *Doyle v. Sleeper and Alsop*, *supra*, are consequently no longer the law upon this subject.

Just prior to the payment of \$400 to Weir, Mrs. Murphy received from the administrator of her father's estate the sum of \$416.55, but only \$256.55 was paid in money. That money we think went into these payments, but the balance came from some other source, and as it is not shown where it came from, we must presume it was paid with the money of the husband, and to that extent the payment was a legal fraud upon his creditors. It also appears that the husband paid to Matthews \$60 by transferring to him a mortgage, this also was within the statute.

We do not concur with counsel that the husband might lawfully anticipate the receipt of the wife's money and advance his own money to pay for property conveyed to her. It was his duty, if he had money, to pay it to his creditors, and to advance it to pay for property conveyed to her was as much within the statute as if she had no money coming to her. But as actual fraud is neither alleged nor proved, Mrs. Murphy will be entitled to be reimbursed the sum of \$256.55 paid out of her money.

The appellants should amend their petition and make Matthews a party, and if he has not been paid he should set up his lien and the property should be adjudged to be sold to pay, first any balance due to him, second, to Mrs. Murphy the amount paid out of her money for the lot, and third, to pay to the appellants whatever sum was paid on the property by C. M. Murphy after the creation of the appellants' debt.

Judgment *reversed* and cause remanded for further proceedings.

Jas. Weir & Son, for appellants.

W. N. Sweeney & Son, for appellees.

B. V. RAY, ET AL. *v* H. B. RAY, ET AL.

Construction of Will.

Where a testator, after devising all of his estate to his nephew, provided that, if there should be any profit from he had made from certain relatives of their interest in estate, it should go to those from whom he purchased stock but provided that the devisee, his nephew, was to be the judge of whether there were such profits, it was held that the decision of the nephew as to such profits was final, and where he decided there were no profits to divide, the court, in an action by relatives, was not to review his decision.

APPEAL FROM MARION CIRCUIT COURT.

October 23, 1879.

OPINION BY JUDGE COFER:

This suit was brought by the heirs-at-law of Francis Ray against the executor and devisees of Foster Ray to recover profits alleged to be given them by the will of the latter.

Foster Ray, after devising all his estate to his widow and nephew, Hugh B. Ray, goes on to say "and should the profit arising from the purchase of the different legatees of F. S. Ray's estate, which interest I bought of them, after ten per cent. on the amount I paid for it and compound interest year, also including taxes, costs, and paying for troubling them with it, as it is not my wish to speculate out of them, the nephew Ray is to be sole judge of this, and no appeal to be taken from his decision."

The interest here referred to was an undivided interest of F. S. Ray in certain real estate owned by him and Foster Ray. It is not alleged that H. B. Ray had failed or refused to decide whether there had been any profit on the purchase, or that he was not honestly decided, but it is alleged that there were large profits and the court was asked to decide what the profit amount was and to render judgment therefor.

H. B. Ray answered insisting that the question whether there was any profit was to be decided by ascertaining the value of the property at the time of Foster Ray's death, and he alleged that he had done this and that there was no profit, and insisted that his decision was final and conclusive.

By consent of the parties the cause was submitted to the court for a construction of the will. The court adjudged that the value of the property, as of the date of the death of Foster Ray, was the criterion for ascertaining whether there was any profit, and that the decision of H. B. Ray was not conclusive, but the court could inquire into and determine the value of the property, the amount of taxes and costs, and what would be a proper allowance for trouble in attending to the interest purchased, and referred the cause to a commissioner for that purpose.

From that judgment the plaintiffs have appealed, and the defendants prosecute a cross-appeal.

The plaintiffs contend that the court erred in fixing the time of the testator's death as the period at which the value of the property was to be computed in order to ascertain whether there had been a profit; that, as H. B. Ray and the widow of the testator were devisees of the property and executor and executrix of the will, it was their duty to sell the property in order to ascertain whether there was any profit, and how much, and that as they have not done so they should now be compelled to sell, or the property should be estimated at the present value, and judgment rendered in their favor on that basis.

The appellees contend that the court erred in deciding that the decision of Hugh B. Ray that there were no profits is not final, and that the court might inquire into the facts and decide that question. The testator did not direct the property to be sold, and the absolute gift of it to the two devisees is inconsistent with the duty on their part to sell it for any purpose of the will. As they were not bound to sell, the only right the plaintiffs could have was to have the value ascertained as of the time of the testator's death. The case from its very nature does not admit of any other period, and the court did not err to the prejudice of the plaintiffs.

The cross-appeal presents some difficulty. It is contended for the appellants that the will creates a trust in their favor, and vests them with a right to the difference between what they received for their interest in the property, and interest, taxes, etc., and the value

of the interest at the period fixed for computing such that as Hugh B. Ray is a devisee of one-half of the test and therefore interested, to decide that there is no profit giving him such power, is repugnant and void.

That the will creates an interest in the children of F entertain no doubt. If Hugh B. Ray had failed or refused the power given him to decide whether there was or not, or had fraudulently exercised the power, or had exercised it, we do not doubt but that the chancellor might exercise it in his stead. The power was given to him for the benefit of the appellants, and it was therefore not a naked power which he might exercise or not at his mere pleasure, but it was coupled with a trust or duty, and the object of the testamentary trust would be defeated by his failure or refusal to execute the power. *On Trusts*, Secs. 248 to 251.

But he has executed the power and there is no complaint that he has not done so fairly, so that the precise question is whether conceding all this the appellants nevertheless have the right to have the question investigated and decided by the court. I think they have not.

While it is true the will shows clearly and unmistakably that the testator designed that the children of his brother should share the profit that there might be on the property purchased for them, it also shows with equal clearness that he did not intend that they should have anything if Hugh B. Ray should decide that there was no profit. And while the language of the bequest is absolute when taken from the last sentence, when the whole is considered it is no more than a gift or condition that there shall, in the event of the death of Hugh B. Ray, be a profit on the purchase, and in order to remove all room to doubt that such was his purpose he declares that "the profit shall be taken from his decision." Ray is the donee of the power, and the trust does not extend beyond the bona fide exercise of the power. If it has been exercised honestly and in good faith, the trust is at an end, and the chancellor has no more power to set aside the action of any other trustee whose action is not proved to be as unfaithful.

It may seem unreasonable that he should have been empowered to determine whether the appellants should have anythin estate, one-half of which was given to him. But however unreasonable such a provision may be, it is not unlawful. The

a right to ascertain in his own way, and by such agency as he chose to indicate, whether there was any profit, and, if any, how much.

Precatory words are held to create trusts solely on the ground that such was the intention of the testator, and consequently, when notwithstanding the use of such words it has appeared that the testator did not mean them to be peremptory, but merely hortatory, it has been held that they do not raise a trust.

In this case the bequest, when considered independently of the provision in regard to the agency for ascertaining whether there was a profit, seems clearly to indicate that the testator intended the children of his brother to have whatever profit there might in fact be, but it is equally clear, when the whole clause relating to that subject is considered together, that he also intended that it should be conclusively ascertained by Hugh B. Ray, whether there was any such profit, and if Ray should decide that there was no profit they should not have anything. To hold, notwithstanding his decision fairly made, that the court can inquire into the matter and reverse his decision, is to disregard the plainly expressed intention of the testator and to make a will for him.

Wherefore the judgment is *reversed* on the cross-appeal and the cause is remanded for further proper proceedings.

Russell & Arritt, for appellants.

J. I. Galladay, John M. Porter, for appellees.

ALBERT BUSH v. COMMONWEALTH.

Bill of Exceptions.

A bill of exceptions signed by the judge of the court, but which was not filed in the court below within the time allowed for its filing, or not filed at all, does not become a part of the record and cannot be considered by the court of appeals.

APPEAL FROM HART CRIMINAL COURT.

October 24, 1879.

OPINION BY JUDGE COFER:

At the last August term of the Hart Criminal Court the appellant was convicted of the murder of Philip Richardson, and sentenced to confinement in the penitentiary for life. His motion for a new trial

was overruled, and he has appealed to this court, but we consider the errors alleged.

The judgment was rendered August 9, and on his next days were allowed him to prepare and file his bill of exceptions. There is copied into the record what purports to be a bill of exceptions, and to be signed by the judge of the court, but which never had to have been filed in court. This statement of the clerk is not in the transcript immediately following the order giving leave to prepare and file a bill of exceptions: "The bill of exceptions was filed in the foregoing judgment, and filed in office August 11, 1881." It reads in words and figures, as follows, to wit: * 4. This shows that the bill of exceptions was never filed in court, and the court will take judicial notice of the fact that the Hill County Court was not then in session.

The statute required the Metcalfe Court in the same term to be presided over by the same judge to convene on the second day of the term which was the 11th day of August.

Sec. 282, of the Criminal Code, provides that exceptions must be shown upon the record by bill of exceptions, prepared and filed as provided in the Code of Practice in Civil Cases. Sec. 334, of the Civil Code, provides that the party objecting to the decision must except when the decision is made; and time is given to prepare a bill of exceptions, but not beyond a day in the next term, the time being term to be fixed by the court, and Subsec. 7, of Sec. 334, provides that the bill of exceptions shall be signed by the judge, and be filed, but not spread at large on the order book.

This contemplates that the filing of the bill of exceptions shall be noted on the record of the court, and such has been the uniform and long-established practice, and a bill of exceptions which is not a part of the record and cannot be considered as such. See *English v. Young*, 10 B. Mon. 141; *Corley's Ex'r v. Corley*, 4 Bush 409; *Biggs v. M'Ilvain's Ex'x*, 3 A. K. 1; *Freeman v. Brenham*, 17 B. Mon. 603; *Allard v. Smith*, 18 B. Mon. 603; *Vandever v. Griffith*, 2 Met. 425.

Wherefore the judgment must be affirmed.

Woodson & Wiley, S. M. Taylor, for appellant.
Hardin, for appellee.

JOHN B. ADAMS, ET AL. v. STEPHEN ADAMS.

Life-Estate Holders Entitled to Homestead.

One vested with a life-estate in real estate is as much entitled to a homestead as if he held the fee simple title.

Creditors' Rights.

Where a life tenant is entitled to a homestead right, if the life estate is worth more than \$1,000 the creditors can subject the property to pay their claims by first paying to her \$1,000; but in case the property is divisible, as much of it as is of the value of \$1,000 may be set apart to the life tenant, and the balance subjected to creditors' claims.

APPEAL FROM DAVIESS CIRCUIT COURT.

October 24, 1879.

OPINION BY JUDGE PRYOR:

The conveyance could not have been fraudulent, for the reason that the money was advanced by the son and the property redeemed, not as a matter of right, but by the consent of the plaintiffs in the execution. The title, legal and equitable, had passed out of Mrs. Read, and the permission to redeem was a mere act of kindness on the part of the creditors toward a son who was anxious to relieve his mother from her pecuniary troubles.

The conveyance not being fraudulent, it is only necessary to determine what interest the appellant, Mrs. Read, has in the property. She is in the possession, entitled to a support and maintenance for life and to the rents and profits for the same period. She is vested with a life estate in the property, and is as much entitled to a homestead as if she owned the absolute fee. The very purpose of the deed was to secure her in this right, and the chancellor, in aid of such a laudable transaction, instead of pronouncing it fraudulent, must determine that she claims only what the law secures to her as against creditors. She is entitled to a homestead in the property, and if her life estate is more valuable than the \$1,000, the creditor can subject it, by first paying to her that amount. If divisible, as much of the property as is of the value of \$1,000 will be set apart to her, and the balance sold for and during her natural life. If indivisible, the life estate may be sold, and out of the proceeds the ap-

pellant will be first paid \$1,000. The interest in remain
in the son.

Judgment *reversed* and cause remanded for further
Little & Slack, for appellants.

W. N. Sweeney & Son, for appellee.

MARY J. HOPKINS *v.* J. M. HOLMES.

Dower, Not Lessened by Prior Homestead.

Where a wife does not join in a mortgage on real est
death of her husband she is entitled to have her dowe
off to her, and where she is not asserting any homes
against the mortgagee, there is no reason for lessening
her dower by reason of the homestead exemption mad
life of her husband.

APPEAL FROM DAVIESS CIRCUIT COURT.

October 28, 1879.

OPINION BY JUDGE PRYOR:

This is an action by Mary J. Hopkins against the appel
for the purpose of having dower assigned her in a tract
of land that originally belonged to her husband, and wa
a mortgage executed by the latter to Bransford and c
demnify them as his sureties.

In the proceeding to foreclose the husband asserted h
homestead, and out of the purchase money \$1,000 was
Hopkins and accepted by him in place of the land, and wit
he purchased a small farm where his widow now reside
ting dower the court below deducted from the value o
of the widow the \$1,000 that had been paid over to the h
she appeals.

She was no party to the mortgage executed by the
Bransford, and as she is not asserting any claim to a h
against the appellee there is no reason for lessening t
her dower by reason of the exemption made during th
husband. That thé appellee purchased subject to her po
of dower is unquestioned, and in this purchase obtain
free from the homestead exemption. This was paid out
chase-money, and the appellee obtained all the right h

and is in no manner interested in the homestead now occupied by the widow. If there had been no payment in money, and the homestead of the value of \$1,000 had been set apart in the land after the death of the husband, the widow could have asserted claim to dower, and in allotting it she must account for the value of the homestead for the reason that the statute expressly provides that in claiming both dower and homestead the value of the dower must be abated by the value of the homestead. The question of homestead is not involved in this controversy.

The money value of the homestead, when paid to the debtor, may be invested in another homestead if he sees proper to do so. The chancellor will not compel him to make the investment, and if he should invest the money in other property not exempt from execution it may be sold to satisfy the claims of creditors. The appellee is not even a creditor, and with the claim of dower on his land, has obtained all he purchased. It was the land encumbered by the dower that he purchased, and to give him more, and the widow of the debtor less, would be manifestly unjust. It is only where the allotment is in kind, and a claim to a homestead is asserted or exists in the land in which dower is sought to be obtained, that the abatement in the value of the dower is to be made. This is the object of the thirteenth section of the statute in which it is provided that the homestead shall be allotted in estimating dower. The right of the purchaser is in no manner diminished by giving to the widow her dower in the entire tract.

Judgment *reversed* and cause remanded with directions to allot dower without regard to the homestead exemption.

Sweeney & Son, Houston & Mulligan, for appellant.

Weir & Son, for appellee.

A. D. BROWN v. COMMONWEALTH.

Criminal Law—Instruction.

Where an erroneous instruction is given, which was not prejudicial to the substantial rights of the accused, the cause will not be reversed on account of it.

Evidence.

In the trial of one charged with murder evidence showing threats, menaces, assaults, lying in wait, carrying character of the deceased for lawlessness or violence, stances of the meeting and other facts showing that th in peril at the time of the killing, or that he had reason for believing he was in peril, for the purpose of showing was grounds for believing he was then in danger.

APPEAL FROM TRIGG CIRCUIT COURT.

October 28, 1879.

OPINION BY JUDGE HINES:

The objections to the action of the court in permitting to separate, and to the manner in which they arrived at the having been first presented and brought into the record or for a new trial, are not the subject for review by this court. *v. Commonwealth*, 13 Bush 246, and *Kennedy v. Commonwealth*, 14 Bush 340.

While the second instruction given in this case is altogether erroneous, in that it groups together and gives too much weight to certain facts from which the jury may draw the conclusion of malice, it does not appear to us that it could have been in any way prejudicial to the substantial rights of appellant. If the jury having found a verdict of manslaughter, necessarily found that the killing was not done in malice. If a verdict of murder had been returned a different or a more difficult question might have arisen. Then it might with plausibility have been said that the instruction given to the evidence pointing to malice likely misled the jury to finding its existence; but as they have found that there was malice in the killing, it is manifest that the instruction was not noxious.

The other instructions complained of are in reference to the right of self-defense. Without setting them forth in full, it is sufficient to say that we consider them substantially correct. As stated in *Parsons v. Commonwealth*, 78 Ky. 102, we are disposed to adhere to the rule as stated in *Kennedy v. Commonwealth*, *supra*.

"Threats, menaces, assaults, lying in wait, carrying character of the deceased for violence or lawlessness, stances of the meeting, and any other fact tending to show that the slayer was in peril at the time of the homicide, or that

reasonable grounds upon which to believe he was in such peril, may all be given in evidence for the purpose of showing that there were grounds to believe he was then in danger; but if, notwithstanding all these things, he had no reasonable ground for believing he was then in danger, they will not excuse him on the ground of self-defense, although they may have justified him in believing he would be in such danger at some future time."

The court did not err in refusing instruction No. 9, asked for by appellant; it was abstract and belonged more appropriately to the domain of logic than to that of absolute law, and should have been left to the consideration of the jury, without embarrassing prominence being given to the suggestion embraced therein, as in all other cases where the question is simply one of weight of evidence.

Judgment affirmed.

Fenton Simms, for appellant. Hardin, for appellee.

CONSTANTINE WAYNE, ET AL., v. LUDWELL A. FOOTE, ET AL.

Mental Capacity to Convey Real Estate.

A deed of conveyance made by a grantor of doubtful mental capacity, which has stood for more than twenty-five years, and the property has been conveyed by the grantee, who purchased the same for a valuable consideration without any notice of the fraud of his grantor, if there was fraud in securing the conveyance, will not be set aside because of the feebleness of the original grantor's mind.

APPEAL FROM BRECKINRIDGE CIRCUIT COURT.

October 28, 1879.

OPINION BY JUDGE PRYOR:

It is alleged in the petition of the appellant that this conveyance by his brother, and to which appellant's signature is affixed by mark, was executed in the year 1852, and these appellees, or their vendors, have been in possession claiming to own and hold this land under this original conveyance since its date. There is no allegation that the vendees from the Dents knew of the mental imbecility of the appellant, or practiced any fraud upon him in obtaining the title and possession of the land in controversy. That they parted with their money as innocent purchasers for value is not controverted, and the fraud of the Dents, if any, will not affect

their rights. The petition does not present a cause against the vendees of Dents. It is not alleged in dis that they knew appellant was feeble-minded or had been by their vendors. It is alleged that in 1852 the Dents fraud on the appellant, and in short that he was an these times, and well known to be so by all these pa general allegation may be construed as applied alone to ing the original contract, and is not sufficiently specific the appellees with the conveyance, or a knowledge of ance made by the Waynes to Dents.

In looking alone to the facts of this case, although s the appellant was almost destitute of mind, after th twenty-five years or more from the date of the conve innocent purchasers in possession, who have parted money on the faith of a title of record, the chancellor w reluctant to disturb their possession or to invalidate their conveyance by the appellant was not void, but voidabl but for the insolvency of one of the original grantors would never have been instituted. No contract or conv mitted to exist for a quarter of a century as a matter evidencing the right and title of those who have been ir and claiming under it, ought to be disturbed by the cha less he is forced to grant such relief by reason of some abilities created by the statute.

Judgment affirmed.

Sweeney & Son, Geo. W. Jolly, for appellants.

Lewis & Fairleigh, G. W. Williams, Kinchelwe & Es appellees.

G. W. DICKEY *v.* R. D. SALMONS.

Reversal on Weight of the Evidence.

Where issues are joined and a trial had before the tria knew and had an opportunity to observe the witnesses, a ders a judgment, it will not be disturbed by this cour cause on the face of the record the weight of the eviden be against the finding of the trial court.

APPEAL FROM SIMPSON CIRCUIT COURT.

October 30, 1879.

OPINION BY JUDGE HINES:

Upon the question as to whether there was a trade between appellant and Sullivan by which the property in the bay horse passed to Sullivan and the property in the sorrel horse passed to appellant, the evidence is conflicting. We may safely say that the weight of evidence is to the effect that no such trade was made, but is the contrary finding of the court below so flagrantly against the evidence as to justify a reversal? That issue is purely a legal one, and the finding thereon should not be disturbed unless we would be authorized in reversing a judgment based upon such a verdict found by a jury under proper instructions as to the law. It appears to us that, considering the fact that all the parties and witnesses are presumed to have been known to the court below, and that, therefore, the statements of the witnesses received the credence to which they were entitled, the judgment should not be disturbed simply because, on the face of the record, the weight of the evidence seems to be against the finding of the court. When such issues, without objection, are submitted to the court without the intervention of a jury, the parties must be judged by the same standard that would be applied when the judgment is based on the finding of a jury.

Considering the case from an equitable point only we are not prepared to say that the judgment is erroneous. If, as the evidence tends to show, the sorrel horse received by appellant from Sullivan was embraced in the mortgage to appellee, and the horse was sold by appellant and the proceeds of the sale appropriated to his own use, it does not appear to be material whether there was in fact a trade between appellant and Sullivan of the bay for the sorrel horse. We may infer, from the evidence, that appellant had a mortgage upon the sorrel horse; that he agreed to stand good for certain advances made by appellee to Sullivan, and that, in consideration that appellee would release him from this guaranty he (appellant) would cancel his mortgage and permit appellee to take the same property, by mortgage, to protect himself on the advances thus made; that a mortgage, in pursuance of this agreement, was made by Sullivan to appellee, and that the bay horse claimed by appellant was of no greater value than the sorrel horse mortgaged to appellee. In the absence of any fraud on the part of appellee in obtaining possession of the bay horse from Sullivan, there ap-

pears no reason in equity why the value of the one horse may not be set off against the value of the other. On the whole case we are of the opinion that the judgment of the court below should be affirmed.

G. W. Whitesides, for appellant. Bush & Porter, for appellee.

GEORGE W. BRAMLETTE *v.* JOHN D. ELLINGTON, ET AL.

Vendor's Lien.

A vendor's lien can only be retained when it is expressly stated in the deed what part of the purchase-money remains unpaid.

Liens Retained by Several Vendors.

Where one grantor owns two-thirds of the land conveyed, and another an undivided one-third, and a lien for purchase money is retained, each of said grantors has a lien for the sum due him on the interest he conveyed, and no more.

APPEAL FROM NICHOLAS CIRCUIT COURT.

October 30, 1879.

OPINION BY JUDGE COFER:

At the common law a vendor had a lien on land sold until the purchase money was paid. By Sec. 26, Chap. 80, Revised Statutes, it was declared that where any real estate should be conveyed, and the purchase money, or a part of it, remained unpaid, the vendor should not thereby have a lien for the same, unless it was expressly stated in the deed what part of the consideration remained unpaid.

The deed before us shows that one of the grantors owned two-thirds and the other one-third of the land, and that notes were executed to each for his interest, and how much was due to each. The effect of that was that each retained his lien on the interest he had conveyed.

But by express stipulation "they retained a lien on the land until the whole purchase money should be paid," and it is contended that thereby each acquired a lien on the interest conveyed by the other. We do not think so. They retained a lien. This presupposed that a lien already existed. Such was not the fact; each had a lien upon his own share, but he had no lien on the share of the other, and could not retain what he never had. This results necessarily from the fact that stating in the deed what part of the purchase

money remains unpaid merely preserves a lien already existing, and does not create a lien. When the parties retained a lien they must be understood to have referred to the lien created by law, and not to have intended to create a new lien.

It is true this construction renders the stipulation that a lien is retained superfluous, but if we take the language as we find it, it admits of no other reasonable construction, and between giving a stipulation no effect and giving it one the language does not reasonably admit of, we must choose the former.

Judgment *affirmed*.

Hargis & Nowell, Reid & Stone, A. Duvall, for appellant.

R. Gudgell, Ross & Kennedy, for appellees.

JAMES DRAKE v. COMMONWEALTH.

Criminal Law—Dying Declaration.

A declaration, made by one suffering from an injury after he is informed by the surgeon that he can only live a short time, he believing what is told him, is admissible as a dying declaration against one accused of his murder.

Facts Stated in Dying Declaration.

It is incumbent on the prosecution in a murder trial not only to show that a declaration offered in evidence was made in the view of approaching death, but the facts stated in such declaration must have such relation to the act of killing as renders them admissible in evidence, and where other evidence introduced by the prosecution shows that there was a considerable interval between the facts first stated and the fatal meeting, the part of the declaration pertaining to the facts first stated should be rejected.

Dying Declarations Not Required to Be in Writing.

The law does not require dying declarations to be reduced to writing, and where they are written they are not required to be attested. Oral declarations may be admissible in evidence.

APPEAL FROM FAYETTE CIRCUIT COURT.

November 10, 1879.

OPINION BY JUDGE COFER:

The surgeon repeatedly told the deceased that there was no hope of his recovery. The deceased sent for Cooper on Saturday to

write his declaration, and died on Wednesday following. He told Cooper he knew he could not get well and that his death was only a question of time. When considered in connection, these facts seem to us sufficiently to prove that the declaration was made in expectation of near approaching dissolution. That he believed what his surgeon had repeatedly told him is shown both by his declaration to Cooper and the fact that he desired to make a statement of the facts of the difficulty in which he was injured.

That part of the declaration which relates to what took place while the deceased was sitting on Kearney's porch did not relate to the act of killing, and the circumstances immediately attending it and forming part of the *res gestæ*. *Leiber v. Commonwealth*, 9 Bush 11. The attorney general contends that this does not appear on the face of the declaration, and that in passing upon the question of admitting it in evidence the court must consider the declaration as it appears, and admit or reject it without reference to other evidence which may tend to show that some of the facts detailed occurred at another time and place.

We do not concur in either of the propositions.

The deceased said "Mr. Drake, after passing up and down on the pike several times, took a seat on his steps on the pike" and then goes on to say "Me and my brother John started home when he called to us; we stopped until he came up, when my brother John said to him, 'You are old enough to have some sense,' etc., and while they were talking his wife came up with a gun." This shows that there was an interval of greater or less duration between the time when the deceased sat on Kearney's porch and the meeting of the parties as the two Ryans were proceeding to the home of John, and as only facts and circumstances immediately attending the act of killing are admissible, it is incumbent upon the prosecution to show facts stated in a dying declaration offered in evidence have such relation to the act of killing as renders them admissible in evidence. It is not enough that on the face of the declaration they do not appear to have been disconnected from the *res gestæ*.

The other evidence introduced by the commonwealth shows clearly that there was a considerable interval between the facts first stated, and to which we have been referring, and the fatal meeting, and on that ground that part of the declaration referred to should have been rejected.

But we are of the opinion that its admission was not prejudicial to the substantial rights of the prisoner. The facts stated by the deceased were proved by other witnesses, and seem not to have been controverted on the trial. They occurred on a street of the village of Donerail, and that no witness was offered to counteract the statement of the witnesses for the prosecution as to what occurred there tends to show that the defense did not dispute these facts. The prisoner was found not guilty of murder and consequently, the tendency of this part of the dying declaration to prove malice did not prejudice him in that respect, and as their bearing upon the question of self-defense was only collateral and by no means strong, we think it clear that he was not prejudiced by the admission of that part of the declaration we have been considering. The residue of the statement was clearly admissible as relating to *res gestae*.

It is next objected that there are three attesting witnesses to the paper, only one of whom was called as a witness to prove the declaration. The law does not require dying declarations to be reduced to writing, and if written does not require that it shall be attested, and when this is done it is not necessary to produce more than one of the attesting witnesses. 1 Wharton on Evidence, Sec. 729.

That the court, on objection to the admission of the declaration, struck out a considerable portion, furnished no reason why so much of the residue as would have been competent, if standing alone, should not be read. The declaration not being required to be written, so much of it as was competent could not be rejected because there was incorporated with it matter that was incompetent.

Although the opinion in *Lieber v. Commonwealth*, *supra*, does not show it, the fact is shown by the record that the declaration offered in evidence was in writing, and the court held that the court below erred in admitting a portion of it, but did not intimate that the whole was inadmissible because a part was so.

The bill of exceptions recites that "The court on motion instructed the jury as follows." This is followed by the instructions given, and they are followed by this: "To which instructions the defendant excepted and still excepts," etc. From this language we must assume that the instructions were given on motion of the commonwealth, and as the record does not show that they were objected to

we cannot consider them. Sec. 282, Criminal Code; Sec. 333, Civil Code; *Loving v. Warren County*, 14 Bush 316.

Wherefore the judgment is *affirmed*.

Breckinridge & Shelby, W. C. Owen, for appellant.

Hardin, for appellee.

COMMONWEALTH v. WILLIAM MINOR.

Criminal Law—Intoxicating Liquors.

Where upon a charge for selling intoxicating liquors it is shown that the accused sold "Bitters," which the buyer drank as a beverage and which contained a large per cent. of alcoholic liquor, the jury is warranted in finding the accused guilty; and an instruction by the court to find him not guilty is erroneous. The cause should have been left to the jury to determine.

Instructions.

When in the trial of one charged with selling intoxicating liquors it is shown by the evidence that "Grave's Bitters" were sold and drunk by the purchaser as a beverage, and that such bitters contained a large per cent. of alcohol, the court should charge the jury that if the bitter's contained alcoholic liquor and was so compounded as to render it fit for use as a beverage, they should find the defendant guilty, although they might believe it also contained drugs which made it also a medicine.

APPEAL FROM GALLATIN CRIMINAL COURT.

November 15, 1879.

OPINION BY JUDGE COFER:

The appellee was indicted and put upon trial for violating the local option law. The evidence conduced to prove that he was a merchant, and kept for sale a few patent medicines and Hossteter's Bitters, Wine Bitters and Graves Bitters; that he sold a bottle of "Graves Bitters" to a person named in the indictment and furnished him with a glass, and he and his friends drank it in the store as a beverage, and that it contained some sort of alcoholic liquor, and something which imparted to the compound a bitter taste.

The jury would have been warranted in finding that the so-called "Bitters" was largely composed of alcoholic liquor; that it contained so much alcohol as to make it desirable as a beverage by those who wished that kind of stimulant. But the court, on mo-

tion of the appellee, instructed the jury to find him not guilty. This was error. Upon such a motion the court should have assumed as true every fact the jury would have been justified in finding from the evidence. The court had no right to decide the question of fact whether the "Bitters" was or was not spirituous liquor, and especially had no right to decide that it was not when the positive testimony of more than one witness was that it contained whisky or some other spirituous liquor, and that they drank it as a stimulating drink, and that it was used as a beverage as well as a medicine.

The jury should have been told, in substance, that if the "Bitters" contained alcoholic liquor, and was so compounded as to render it fit for use as a beverage and desirable to those wishing alcoholic stimulants, they should find the defendant guilty, although they might believe it contained drugs and other things which made it also a medicine.

The fact that the "Bitters" is so compounded as to be used both as a medicine by those who are sick, and as a stimulating beverage by those who wish such a beverage, strongly suggests that it is a mere device for evading the law, and if it be it should not be permitted to succeed.

Judgment *reversed* and cause remanded for further proper proceedings.

Hardin, for appellant. J. J. Landrum, for appellee.

WILLIAM ROAB *v.* MARY BURGESS' ADM'R.

Construction of Will.

When all the estate of a testator is devised to named persons to hold and enjoy during their natural lives, and to dispose of as they may think best for their own interest, and at their death whatever remains of the property is given to another, it is held that such other takes a vested interest subject to be defeated by a disposal of the life tenants.

APPEAL FROM LIVINGSTON CIRCUIT COURT.

November 18, 1879.

OPINION BY JUDGE PRYOR:

All the estate of the devisor is devised to Montgomery and Anderson to hold and enjoy during their natural lives, and to dispose of as they may think best for their own interest, and at their death

whatever remains of said property is given to Mrs. Burgess and her children forever. It is plain that Mrs. Burgess and her children took a vested interest subject to be defeated by a disposal of the estate by the life tenants. The fact that the devise over may never take effect does not make it a contingent remainder. Here is a fixed right of future enjoyment that may not take effect in the event the property is sold or squandered. A devise to "A" for life, remainder to "B" for life, is a vested interest in "B," although it may never be enjoyed. See *Jackson's Adm'r v. Sublett*, 10 B. Mon. 467. That this is a vested remainder there can be no doubt.

Judgment *affirmed*.

Hamblin & Webb, for appellant.

Bush & Hendricks, for appellee.

ELIZA A. HARRISON, ET AL., v. ADA A. HARRISON, ET AL.

Beneficiary of Life Insurance.

One holding a certificate or policy by which the company, upon condition of certain payments, stipulate to pay his daughter certain sums of money at his death, may by will legally require said sums of money to be divided between his two daughters. His will is held to be an assignment pro tanto.

APPEAL FROM MEADE CIRCUIT COURT.

November 18, 1879.

OPINION BY JUDGE COFER:

Wornal P. Harrison held two certificates of membership in the "Masonic Mutual Benefit Society, of Indiana," by which the society undertook, upon condition he should pay certain premiums therein stipulated, to pay certain sums to "Ada A. Harrison, daughter, or the legal representative of said Wornal P. Harrison, within thirty days after due notice and satisfactory evidence of the death of said Wornal P. Harrison, and proof of interest, if assigned or held as security."

At the time of taking out the certificates Ada A. was the only child of the assured. Afterward, another child was born to him, and before his death he made and published a last will and testament whereby he bequeathed the proceeds of the policy to be equally divided between his wife and two children, and the only ques-

tion in the case is whether he had power thus to dispose of the fund.

These certificates were merely evidences of an intended gratuity to Ada, and he had a right to reserve to himself such power over them or their proceeds as he chose, and the provision for proof of interest in case the certificates should be assigned shows that it was understood between him and the society that he might assign or pledge them, and that the assignee or pledgee should be entitled to the fund to the extent of his interest. Whatever interest Ada had in them was taken and held subject to this power in her father to pledge or assign the certificates, and his will should be treated as an assignment *pro tanto*.

Wherefore the judgment is reversed, and the cause is remanded with directions to render judgment dividing the fund as directed by the will.

The costs in this court, and in the court below, should be paid out of the fund before division is made.

Lewis & Fairleigh, for appellants.

William Alexander, for appellees.

W. S. COOPER'S ADM'R v. LOUISVILLE & NASHVILLE RAILROAD CO.

Appeals.

An appeal can only be taken from a final judgment.

Bill of Exceptions.

Where the appellant obtained a verdict against the appellee, and on motion it is set aside and a new trial granted, such appellant, who has prepared his bill of exceptions, is entitled to have it signed by the judge, although no appeal could be taken until the final determination of the case.

APPEAL FROM MARION COURT OF COMMON PLEAS.

November 18, 1879.

OPINION BY JUDGE PRYOR:

This is an appeal prosecuted from an order made in a cause still pending, and in which no final judgment has been rendered.

The appellant obtained a verdict against the appellee, and on motion this verdict was set aside and a new trial granted. The appellant, with a view of saving the questions made on this trial, and

with a view of securing the verdict, prepared his bill of exceptions, and the judge declined to sign the bill, for the reason, as is stated, that no appeal could be taken until the final determination of the case. While this was error this court cannot correct it, as the action is still pending and there is no judgment from which an appeal may be prosecuted. A party obtaining a verdict that is set aside is entitled to have his bill of exceptions signed in order that he may show the error, if any, on the part of the court in disregarding the finding. Although a new trial has been granted the party aggrieved has the right to have the whole case from its institution to its final determination made part of the record. If the judge refuses to sign a bill of exception, the code provides the manner in which the exceptions may be had and identified.

The reason assigned by the judge for declining to sign the exceptions can not confer on this court any revisory power. The party in this case has no more right to an appeal from the order in this case than he would from an order refusing the filing of an amended petition or a demurrer. There must be a final judgment before an appeal can be taken.

Appeal dismissed.

Russell & Arritt, for appellant. Rountree & Lisle, for appellee.

LOUISVILLE & NASHVILLE R. R. Co. v. MARY A. GANOTE.

Injury to Animals by Train.

A railroad company is not liable for damages in killing animals when in view of all the circumstances and facts those in charge of the train did that which men of ordinary prudence would have done under the circumstances, having in view the safety of the train, speed and regularity in its running, and the safety of the stock.

APPEAL FROM JEFFERSON COURT OF COMMON PLEAS.

November 18, 1879.

OPINION BY JUDGE COFER:

Under the instruction given them the jury were required to find for the plaintiff, if at the time those in charge of the train discovered or should have discovered the position of the horses there was any danger, however slight, that they would be driven on to the bridge, unless those in charge of the train immediately used all

proper means to stop the train or to retard its progress until the horses could get off or be driven off the track.

We do not so understand the law. When those managing the train saw the horses, they were not bound to take steps to retard the progress of the train, unless in view of all the facts and circumstances the distance between the train and the horses, and between the horses and the bridge, the character of the track, the ease or difficulty with which the horses might escape from the road on either side, and the probability from the nature of the animals that they would do so rather than run into the bridge, they ought to have regarded it as probable the horses would not leave the track.

When stock is on or near to a railroad track in front and in sight of a moving train, there is always some danger that it will remain on or come on the track and be injured, and to require trains to be stopped whenever such danger exists would unnecessarily and unreasonably interfere with railroad transportation, and that speed and regularity in the running of trains which the interest of the public and the safety of persons and property being transported by rail require.

It is the duty of those operating trains to look first to the safety of the train, and to this end they should watch the track before them as constantly as is consistent with the performance of other duties connected with the running of the trains, and they should also look out for stock so near to the track that it will probably run into it and thereby endanger the train, and when stock is injured the inquiry should be, not whether all possible effort was used to prevent such injury, but whether in view of all the facts and circumstances those in charge of the train did that which men of ordinary prudence would have done under the circumstances, having in view the safety of the train, speed and regularity in its running, and the safety of the stock.

The expression "by proper means," as used by the court in *Louisville & Nashville R. Co. v. Wainscott*, 3 Bush 149, is to be understood as meaning such means as men of ordinary prudence would have used under the circumstances. If such is not its meaning, then, as it was a mere dictum, and, as when applied to a case like this and cases generally where stock encroaches upon railroad tracks, it would lead to injustice to railroad companies, and to a hindrance of railroad travel and transportation, we should not hesitate to disregard it as not of binding authority.

Judgment *reversed* and cause remanded for a new trial upon principles not inconsistent with this opinion.

Littleton Cooke, for appellant. B. H. Allen, for appellee.

JOHN A. BARR *v.* J. B. ELDER, ET AL.

Insolvency Within the Meaning of Act of 1856.

Insolvency within the meaning of the Act of 1856 means inability to pay one's debts. It is not enough to show that the debtor did not have property subject to execution in the county of his residence sufficient to pay all of his liabilities.

APPEAL FROM DAVIESS CIRCUIT COURT.

November 21, 1879.

OPINION BY JUDGE COFER:

Waiving all other questions made in the argument, the judgment must be affirmed because there is no evidence that Elder violated the statute. The only evidence conducing to prove that he was insolvent, or that he contemplated insolvency when he executed the mortgage, is a simple return of "nulla bona" on an execution.

This is for some purposes sufficient evidence of insolvency, but it is not sufficient under the act of 1856. The return only proves that he had no property in Daviess county subject to execution, but it falls very far short of proving that he was insolvent or contemplated becoming so. He may have had ample means in Daviess county to pay all his debts, or he may have had amply tangible property in an adjoining county. Insolvency within the meaning of the Act of 1856 means inability to pay one's debts. It is not sufficient to show that the debtor did not have property subject to execution in the county of his residence sufficient to pay all his liabilities.

Judgment *affirmed*.

Riley, Jolly & Walker, for appellant.

Sweeney & Son, for appellees.

GEORGE W. OYLES *v.* CITY OF LOUISVILLE.

Dogs Not Property.

Dogs are not property in any sense that the public may not for its own convenience or safety prohibit one from keeping or permitting a dog to be kept upon his premises, and the power to prohibit includes power to prescribe the terms on which they may be kept.

APPEAL FROM JEFFERSON CIRCUIT COURT.

November 21, 1879.

OPINION BY JUDGE COFER:

Dogs are not property in any sense that the public may not for its own convenience or safety prohibit any one from keeping or permitting a dog to be harbored upon his premises. The general council of Louisville has power to pass ordinances imposing fines not exceeding \$100 for any designated misdemeanor not provided for by the general laws of the state. Sec. 8, pages 10 and 11, Lucas' Charter.

Dogs, though sometimes useful, are known not to be generally so, and it is also known that they are often mischievous, and sometimes dangerous, and the keeping of them may be restrained (*Tenny v. Lenz*, 16 Wis. 566), or even prohibited by the law-making power. The power to prohibit altogether includes power to prescribe the terms on which they may be kept, and the general council therefore had power under that provision of the charter referred to, *supra*, to pass the ordinance in question, the license fee being imposed, not as a tax, but to defray the expense of issuing the license and furnishing a collar for each dog licensed, and by way of restraining the keeping of dogs within the city. *Tenny v. Lenz*, *supra*; *Board of Trustees v. Markham*, 5 Bush 481.

We perceive no irregularity in the proceedings of either board of the general council, except that the ordinance seems to have been voted on by the board of aldermen on the same day it was received from the board of common councilmen, in violation of rule No. 9 of the aldermen.

The charter requires each board to adopt rules for the transaction of business, but it does not make an adherence to those rules necessary to the validity of the acts of the general council. The rules are for the government of the boards, and that they were not being observed may furnish ground of objection in the council, but will not affect acts otherwise regularly adopted, after they have passed out of the hands of the two boards and the mayor. These views render it unnecessary to notice in detail other points made in argument.

Judgment affirmed.

Elliott & Atchison, for appellant. T. L. Bennett, for appellee.

JOHN R. DIXON, ET AL., v. GEORGE W. McCLURE.

Husband's Right of Homestead.

Where a husband mortgages his real estate, his wife not joining therein, he is entitled to claim a homestead in such property as against the mortgage, and the right continues as against the mortgagee, notwithstanding the death of his wife.

Bankruptcy.

The order in bankruptcy setting aside a homestead is invalid as against a pre-existing mortgage, and its only effect was to exempt the homestead from sale by the trustee.

APPEAL FROM HENDERSON COURT OF COMMON PLEAS.

November 26, 1879.

OPINION BY JUDGE COFER:

At the time of executing the first mortgage the appellant was a married man and resided with his family on the mortgaged land, and his wife not uniting with him in the mortgage he was entitled to a homestead as against that mortgage, and that right continued as against that mortgage, notwithstanding the death of his wife. Her death did not increase or enlarge the rights of the mortgagee. The mortgage as executed did not vest the mortgagee with a lien on the homestead and the operation of the mortgage was the same after her death that it was before. *Wing v. Hayden*, 10 Bush 276; *Gaines v. Casey*, 10 Bush 92.

At the time of the execution of the second mortgage neither of the appellants was a married man, and as the mortgage purports to pledge the whole estate, neither is entitled to a homestead as against that mortgage. *Thorn v. Darlington*, 6 Bush 448.

The order in bankruptcy setting aside a homestead is invalid as against a pre-existing mortgage. The bankruptcy court had no power to divest the mortgagee of his security. The only effect of that court's order was to exempt the homestead from sale by the assignee.

It would have been more regular if the court had ordered the homestead to be laid off, and the residue of the land, or so much of it as was necessary for that purpose, to be sold to satisfy the first mortgage, and the residue, if any, to be sold to satisfy the second mortgage, and that the homestead should only be sold in the event it became necessary to satisfy the second mortgage. But as the amount of the second mortgage exceeds the value of a homestead,

we do not see that the substantial rights of the appellants have been prejudiced.

Wherefore the judgment is *affirmed*.

J. R. Dabney, M. Yeoman, for appellants.

J. W. Lockett, for appellee.

JAMES THORNTON v. THOMAS H. GUTHRIE, ET AL.

Causes of Action Not Joint.

A cause of action against one defendant upon an express contract entered into by him alone cannot be joined in the same petition with a cause of action arising upon an implied contract with which the other defendant had no connection. Two distinct causes of action cannot be united and declared upon in the same petition.

APPEAL FROM DAVIESS CIRCUIT COURT.

November 26, 1879.

OPINION BY JUDGE COFER:

The appellees sued upon the alleged express contract of the appellant to pay the debts owed by the firm composed of themselves and the Venables. They alleged that they and the Venables were partners in the Mechanics' Planing Mill; that the partnership was dissolved, the appellees retiring and leasing their interest to the appellant, who took with the lease appellees' interest in the profits, and undertook to pay the debts of the old firm. They made Venables parties and sought to recover against them as partners in the old firm.

The suit was therefore not upon a contract entered into by the appellant jointly with Venables, or upon which he was jointly liable with them. If appellant was liable at all he was liable on his contract, and being the only person bound on it, as far as appeared from the petition, he should not have been sued jointly with Venables. If they were liable it was not on an express contract, but because they were the partners of the appellees when the debt sued for was created. We have, then, a cause of action against one defendant upon an express contract entered into with the appellees by him alone, united in the same petition with a cause of action arising upon an implied contract with which the other defendant had no connection. Two causes of action thus distinct from each

other could not be properly united in the same petition. Sec. 83, Civil Code.

The appellant's motion for a rule to elect should have been sustained, and as it was overruled and the appellees proceeded to judgment against the other defendants, that must be regarded as an election, and on the return of the cause the petition should be dismissed as to appellant without prejudice.

Judgment *reversed*.

Little & Slack, for appellant.

Sweeney & Son, for appellees.

CINCINNATI SOUTHERN RAILWAY COMPANY *v.* POTTS BROS.

Duty of Common Carrier.

It is the duty of a common carrier to transport the chattels it undertakes to carry within a reasonable time, and if it fails to do so it is liable for damages.

Effect of Common Carrier's Special Contract.

A common carrier cannot contract against its own negligence and thus escape its liability, but its liability may be enlarged or lessened by contract.

APPEAL FROM PULASKI CIRCUIT COURT.

November 29, 1879.

OPINION BY JUDGE PRYOR:

The bills of lading containing the terms of shipment should have been examined by the appellees, and whether examined or not, after shipping in the names of others they are estopped to make the railroad liable on any other terms than those mentioned in the contract of shipment.

We have no right to presume that plaintiffs were practicing a fraud on the company by having the hogs shipped in the name of others than the real owners, but we must presume that the parties knew the price to be paid for shipping hogs, and the contents of the papers signed.

The reduction in the price of freight is the consideration on which the shipper releases his right to demand compensation for the delay in shipping occasioned by the ordinary accidents on the road. The hogs of the appellees were not injured by the construction train


running off of the track, but as a consequence of this accident there was a delay of a day or more in shipping the hogs. It is the duty of the common carrier to transport the chattels or merchandise he undertakes to carry within a reasonable time, and if it fails to do so it is liable for damages. This liability may be lessened or enlarged by contract, and when by contract a railroad company provides against the usual and ordinary accidents that occur in running its trains no liability exists. While a common carrier cannot contract against its own negligence we are not prepared to adopt the rule, that in the agreement to transport freight and passengers it is to be held liable for the delay occasioned by the running off of some other train on the road than that upon which the freight is being carried, although there might be proof conducing to show that the accident might have been avoided by the exercise of ordinary care, at least in cases where the delay caused by the obstruction is not unreasonable.

We cannot say from the facts in this case that the delay was unreasonable, but on the contrary it seems to us that the delay cannot be regarded as the result of inexcusable neglect, or that a delay of twenty-four hours by reason of such an accident as is shown to have occurred in this case should subject the company to damages. The facts developed in connection with the obstruction caused by the construction train shows it to have been such an accident as the appellant was providing against in its contract made with the appellees. It was the duty of the company to furnish suitable cars for the shipment of appellees' stock, and to place them in a condition where they would be unloaded in a reasonable time after arriving at market, and their failure to do so would subject them to damages. Under the contract in regard to the shipment there was no such unreasonable delay as authorizes a recovery on that account. The delay is accounted for by the appellant, and was the result of an accident usual to transportation over such roads, and was embraced by the contract of shipment.

Judgment *reversed* and cause remanded with directions to award a new trial and for further proceedings consistent with this opinion.

T. Z. Morrow, J. M. Collins, for appellant.

Fox & Stone, J. E. Hays, J. S. Vanwinkle, for appellees.



ARY BRAND *v.* J. W. BRAND.**Jurisdiction Over Committee for Lunatic.**

When the estate of a lunatic is committed by a court of competent jurisdiction to a committee, the committee is answerable to the court appointing him for the discharge of his duties, and can only be relieved of those duties by that court, which alone has authority to settle his accounts.

APPEAL FROM DAVIESS CIRCUIT COURT.

November 29, 1879.

OPINION BY JUDGE COFER :

The petition shows that appellant was found to be a lunatic, and the appellee was appointed committee by the Ohio Circuit Court. Having been appointed by that court he became its officer, and in all matters pertaining to the trust he was and is answerable to that court, and the Daviess Circuit Court had no jurisdiction either to settle his accounts or to discharge him from the trust.

The estate of a person of unsound mind committed by a court of competent jurisdiction to the hands of a committee is in the custody of the law, and the committee is responsible to the court appointing him for the discharge of his duties and can only be relieved of those duties by that court, which alone has authority to settle his accounts, except as may be otherwise provided by statute.

If the appellee might proceed to make a settlement in the Daviess Circuit Court, he might, if not relieved of his trust, make his next settlement in some other court, and the next in another, and so on, making no two in the same county and rendering it impracticable for any court to know whether he had discharged his trust faithfully or not.

Under Sec. 472, Civil Code, the Ohio County Court may have jurisdiction to settle his accounts, but if so it is only because the statute confers the authority. The court not having had jurisdiction of the subject-matter of the action, the judgment is void, and no motion having been made in the court below to set it aside, we cannot reverse the judgment (Sec. 761, Civil Code), but must dismiss the appeal. The appellee must, however, be adjudged to pay the costs in this court.

The appeal is not barred by the statute. Persons of unsound mind are expressly excepted out of its operation.

Appeal dismissed at appellee's cost.

Owen & Ellis, for appellant. Sweeney & Son, for appellee.

C. W. & J. PIERCE *v.* J. G. MATTHEWS.**Compromise—Consideration.**

The agreement between an insolvent debtor and his creditors, that they will not carry his estate into bankruptcy, on condition that the debtor would pay a cash per cent. of his debts, has a sufficient consideration for its support.

Waiver of Tender.

Where an agreement has been made between creditors and a debtor by which, upon the payment of fifty per cent. of the debts, the debtor is to be released, the repudiation of the release by a creditor constitutes a waiver of the right to demand or require a technical tender of the amount agreed to be paid on the claim.

APPEAL FROM LOUISVILLE CHANCERY COURT.

December 2, 1879.

OPINION BY JUDGE HINES:

Appellant brought suit to recover \$449.66 on account against appellee, recovered half that sum, and was adjudged to pay the cost of the action. From that judgment this appeal is taken.

Appellants executed a written release to appellee on condition that they should receive fifty cents in cash on the dollar of their indebtedness, and assigned their claim in blank. To the plea of release upon this condition and of tender of the fifty cents on the dollar, appellants respond that the signature to said release was obtained by the fraudulent representations of one Hatch, agent of appellee, and that it was without consideration.

Upon the issue of the fraudulent procurement of the assignment and release of the claim against appellee, one of appellants, and a clerk in the house testify that one Hatch came to them, representing himself to be the agent of the creditors of the appellee, and expressing the opinion that he could compel appellee to pay the full amount of the claim, and agreeing that the release should be operative only upon the condition that the said Hatch could secure nothing more than the 50 per cent. In conflict with the statements of these witnesses is the evidence of Hatch, who expressly denies that he made any such representations, says that he was not the agent of the appellee in the matter, that he represented the creditors and believed that the compromise made was the best that could under the circumstances be done.

It also appears from the testimony of one of the appellants that

appellee requested him to go to Higgins & Company and get the fifty cents on the dollar, which appellant refused to do, claiming that the signature had been procured by fraud, and declaring his intention not to abide by it.

In the first place it does not clearly appear that Hatch was employed or was acting for appellee. Hatch expressly denies it; denies that he made the representations attributed to him by Pierce and his clerk, and that he was acting in the interest of the creditors is borne out by the testimony of Higgins. In the second place, the record does not satisfactorily show that appellants could have made more out of appellee than was secured by the compromise, and it does not, therefore, presuming that Hatch was the agent of appellee and made the representations claimed, follow that appellants were misled to their prejudice by relying upon the statements of Hatch.

The repudiation of the release and assignment by appellants and their refusal to confer with Higgins & Company, who were authorized to pay the 50 per cent. on the claims, was a waiver of the right to demand or require a technical tender of the amount agreed to be paid on the claim.

The agreement between the numerous creditors of appellee, on the condition that appellee would pay cash and not carry his estate into bankruptcy, had a sufficient consideration for its support.

Judgment *affirmed*.

W. O. & J. L. Dodd, for appellants.

Bodley & Simrall, for appellee.

NATHAN HOWELL'S EX'R v. COMMONWEALTH.

Listing Property for Taxation.

One who has listed his property for taxation, but for incorrect valuations, cannot be proceeded against by the county attorney and be subjected to the payment of the penalties provided by those who fail to list their property for taxation at all or give in a false list.

APPEAL FROM SHELBY CIRCUIT COURT.

December 2, 1879.

OPINION BY JUDGE COFER:

We are of the opinion that Sec. 3, Chap. 93, General Statutes, if in force, has no application to a case like this, but applies only when a tax-payer has not been legally called upon for his tax list,

and has failed to give any list at all. This view is not only justified by the language employed in the section but is necessary to harmonize it with Sec. 20, Art. 5 Chap. 92.

If Sec. 3 applies to a case like this in which the tax-payer has given a list, but has failed to give a true list, then every tax-payer in the commonwealth who, in the opinion of the county attorney of the county of his residence, has at any time since 1856 failed to give a full and fair list of his taxable property and a true statement of what he is worth under the equalization law, may be brought before the county court and subjected to a reassessment. We cannot persuade ourselves that the legislature intended any such thing, and as the language employed is reasonably susceptible of a different construction, such construction should be adopted in preference to one which may lead to such absurd and oppressive consequences. Not only so, but it is in the power of the county attorney and the county court to defeat altogether the provisions of Sec. 20, Art. 5, Chap. 92, specially designed to subject recusant owners of property to heavy penalties for refusing to list their property when legally called upon to do so, or who give a false or fraudulent list, by proceeding under Sec. 3, Chap. 93.

There can be no doubt, we think, that Sec. 3 was intended to apply to those only who innocently fail to give any list at all, and that Sec. 20 applies to those only who, when legally called upon by the assessor or his assistant, fail or refuse to give a list of their property, or give a false list, or fail or refuse to give the amount they are worth under the equalization law.

The information filed by the county attorney in this case charges that Howell, being called upon by the assessor each year between 1857 and 1878, gave a false list, and failed to give the amount he should have given in under the equalization law. This brought him within the provisions of Sec. 20, and as a proceeding under that section is penal in its character, and as the amount the appellant will be required to pay under the order of the court exceeds \$20, the circuit court had jurisdiction of the appeal. *Evans v. Commonwealth*, 13 Bush 269.

It does not matter that the court only subjected him to the payment of a single tax on the amount it found the testator had failed to list each year. If the statute authorized the court to subject him to the payment of any amount whatever, it required that he should be subjected to the payment of "three times the amount of the tax

upon his estate" and not a single yearly tax on so much of his estate as he had failed to list, and the appellant could not be deprived of his right to an appeal because the court subjected him to the payment of less than the law required if he could be subjected to the payment of anything.

This conclusion is not in conflict with the decision in *McAlister's Ex'r v. Commonwealth*, 6 Bush 581. That was a proceeding under Sec. 2 of the Act of February 2, 1862 (Myers's Supplement, 5), which corresponds with Sec. 3, Chap. 93, General Statutes. It is true that it appears from the report of the case that McAlister gave in a part of his money under the equalization law for one of the years covered by the proceeding, but the attention of the court seems not to have been called to the question whether the statute authorized his list for that year to be revised.

Judgment *reversed* and cause remanded with directions to overrule the motion to dismiss the appeal, and for further proper proceedings.

Bullock & Beckham, for appellant.

J. W. Head, P. W. Hardin, for appellee.

R. S. HAZELWOOD'S ADM'R *v.* E. HAMILTON.

Sale of Real Estate in Gross.

A contract for the sale of real estate is to be construed as other contracts, and when one sells his farm and in the contract sets forth the abutments, and specifies the consideration to be paid, but no statement as to the number of acres to be conveyed, the sale will carry the farm whether it contains a lesser or greater number of acres it was understood to contain by the parties.

APPEAL FROM DAVIESS CIRCUIT COURT.

December 2, 1879.

OPINION BY JUDGE HINES:

The pleadings sufficiently present the issue as to whether the land was sold by abutments and in gross, or by the acre. When there is a substantial tender of an issue, and it is clear from the record that the parties understood the issue in the same way, we will not inquire, after the trial, whether it might have been presented in a better manner. All formal objections to pleadings that do not reach back to nor affect the merits should be made in the earlier

stages of the case, and in the manner provided in the Code. *Posey v. Green*, 78 Ky. 162.

A contract for the sale of land is like any other contract. The meeting of the minds of the parties is essential, and their intention is to be gathered, as in any other case, from what was said and done, and from all the circumstances surrounding the parties and the subject-matter of the contract.

The title bond is the best evidence of the contract made between the parties, and unless mistake or fraud in its execution can be shown it must determine the rights of the parties. The language of the bond is: "I have this day sold to said Hamilton my farm lying on the banks of Green river." The bond then sets forth the abutments, specifies the amount to be paid, but nothing is said as to the number of acres. The vendor was familiar with the boundary of the land, which before the purchase was pointed out to the vendee, and the evidence tends to show that Hamilton desired to have the land run off, not being willing to take it as containing 110 acres, while the vendor, Hazelwood, was willing that the whole boundary should go for the agreed consideration of \$4,500.

If there was any palpable mistake as to the quantity of land, it is immaterial whether the contract was a sale in gross or by the acre. In any event the chancellor should relieve against such mistake. But the only direct evidence that there was a mistake is the fact that the land when surveyed contained 134 acres, and the evidence tends to show that the vendor thought the tract contained only 110 acres. The evidence does not make it clear, however, that either the vendor or vendee proceeded upon the idea that there was only 110 acres embraced in the boundary; the weight of it seems to be that both vendor and vendee were willing to risk the quantity, and that the one sold and the other bought the land embraced within the boundary set forth in the bond.

We feel that we ought not to disturb the finding of the court below unless we were reasonably well satisfied that it is erroneous, and not being so satisfied the judgment must be *affirmed*.

W. N. Sweeney, for appellant. Owen & Ellis, for appellee.

GILBERT GIVENS v. WILLIAM DIXON, ET AL.

Burden of Proof in Fraud Charge.

The burden of proof is on one charging fraud to prove his charge.

Mortgage to Secure Present and Future Indebtedness.

A mortgage executed on personal property to secure both present indebtedness and future advancements is valid, and one extending credit to the mortgagor thereafter is bound to take notice of the contents of such mortgage when the same is of record.

APPEAL FROM HENDERSON COURT OF COMMON PLEAS.

December 2, 1879.

OPINION BY JUDGE HINES:

The burden of proof in this case is on the appellant, who charges that the mortgage from Allen to the appellee, Dixon, was fraudulent. Unless the evidence of fraud is entirely satisfactory we should not disturb the finding of the court below.

The testimony of Dixon, Allen and Jones, tends strongly to the conclusion that the mortgage was executed in good faith to secure certain loans due from Allen to Dixon, and to secure Dixon in such advances as he might make to Allen. While there are various contradictions and inconsistencies in the evidence, and even circumstances indicating that the mortgage was given to shield the property from the creditors of Allen, they are not, in our judgment, sufficient to outweigh the evidences of good faith and authorize us to reverse the judgment of the court below.

The fact that the mortgage recites a present indebtedness, when in fact the claim of Dixon under the mortgage is partly for advances made and moneys paid subsequent to the execution of the mortgage, ought not to affect the question of the validity of the mortgage if, in fact, the mortgage was made to cover such future advances, and in contemplation of such future payments or advancements. That the mortgage was made with that view, and that the payments and advances were made on the faith of the mortgage, satisfactorily appears from the evidence.

It could make no difference to appellant whether the consideration was past or future. He had notice of the existence of a mortgage on the tobacco and corn to secure the sum of \$500, and could not have extended credit to Allen on the supposition that the property would be subject to his debt before the satisfaction of the mortgage debt. It was within the power of the parties, Allen and Dixon, to contract in this way and secure future advances by mortgage, and unless the form of the mortgage misled appellant to his prejudice he cannot complain that the mortgage expressed that it was made to secure an existing indebtedness.

But it is insisted that appellees misled appellant by representing that the mortgage was made to secure only the sum of \$199. The evidence does not authorize the conclusion that the mortgage was made for no other purpose than to secure the past indebtedness. In one place appellant says that Dixon told him that Allen owed them \$90; and in answer to the following question: "Did you at any time hear Dixon state the amount of Allen's indebtedness to him at the time of the execution of the mortgage?" he answers, "I did, just after the execution of the mortgage. He said it was \$90, and that when he got that Allen would not get in his debt any more."

In the first place appellant does not appear to have asked the question or endeavored to learn whether that was the full extent of Allen's indebtedness to appellee, and in the second place it does not elucidate the question as to whether the mortgage was made in part to cover future advances, nor as to whether advances were made. Appellant does not inquire, even from his own statement, whether this was the whole of the consideration for the execution of the mortgage, nor does this appellee make any statement that would justify a prudent business man in acting upon the supposition that the \$90 debt was the sole consideration for the execution of the mortgage. It was within the power of appellant, by direct inquiry, to ascertain the facts in the case, and, taking all he says to be true, he should not be allowed to torture such disjointed expressions in such a manner as to preclude appellees from showing the true consideration.

We are of the opinion that the mortgage was executed in good faith to secure the then indebtedness of Allen to appellees, and for future advances, and that such indebtedness and the advancements made on faith of the mortgage constitute a sum greater than the proceeds of the tobacco, and that the court below did not err in perpetuating the injunction.

Judgment *affirmed*.

J. L. Dorsey, M. Yeoman, for appellant.

Vance & Merritt, for appellees.

SAMUEL BUNT'S ADM'R v. R. H. CHILTEN.

Motion for New Trial.

Before one can bring before the court of appeals for revision the rulings of the trial court upon questions of law arising during the trial, he must bring such rulings to the attention of the trial court by his written grounds for a new trial, and thus give the trial court an opportunity to correct, and where such alleged errors are not made grounds in the motion for a new trial, they cannot be considered by this court.

Assignment of Errors.

Although an alleged error was made a ground for a new trial, it will not be considered in the court of appeals unless it be also assigned as error.

Statement of Grounds for New Trial.

When a ground for a new trial is stated in the motion as "irregularity in the proceedings of the court, and in the prevailing party, by which the plaintiff was prevented from having a fair trial," it is too general to be a compliance with the rule, and should be denied.

APPEAL FROM JEFFERSON COURT OF COMMON PLEAS.

December 2, 1879.

OPINION BY JUDGE COFER:

In order to bring before this court for revision the rulings of the court below upon any question of law arising in the progress of a jury trial, it is necessary that such ruling should be brought to the attention of that court by the written grounds for a new trial. In the progress of such a trial the court may not have an opportunity to fully consider every question of law it is called upon to decide, and the object of the rule requiring grounds for a new trial to be specified is to enable the court to re-examine its rulings which are complained of, and to correct its own errors, if satisfied that error has been committed. And it has long been the well settled rule in this court to refuse to examine into alleged errors in rulings during the progress of the trial unless they are specified in the grounds for a new trial.

This rule has not been changed or modified to any extent by the statute requiring the errors complained of to be assigned in this court, and hence it is the settled rule that although an alleged error was made a ground for a new trial, it will not be considered here unless it be also assigned as error.

The first ground for a new trial in this case is "irregularity in the proceedings of the court and in the prevailing party, by which the plaintiff was prevented from having a fair trial." This is obviously too general to answer the end of the rule requiring the grounds for a new trial to be stated. The particular proceeding of the court or party complained of as preventing the plaintiff from having a fair trial should have been stated, that the court might know what was complained of, and that the adverse party, if his conduct is complained of, might be prepared to repel the charge of irregularity made against him.

The second ground is "misconduct of the jury and attorney for the defendant," etc., stating the conduct of the attorney, which is complained of; but no facts are stated showing misconduct of the jury, and no misconduct on their part is shown.

The third ground is "that the verdict is not sustained by the evidence and is contrary to law," which is sufficient.

The fourth is newly discovered evidence material for the plaintiff, which he could not by reasonable diligence have discovered and produced at the trial. This, though not specifying the evidence claimed to be newly discovered, was sufficient, being supported by affidavits showing who the witnesses were and what they would prove. The fifth is, accident and surprise which ordinary prudence could not have guarded against, and the sixth, error of law occurring at the trial and excepted to at the time. For the reasons assigned in respect to the first ground these are also insufficient.

The seventh is that "the court erred in permitting the affidavit of the defendant to be read as a deposition, because the same is illegal and incompetent." This is sufficient.

It thus appears that the only grounds upon which the court below would have been authorized to grant a new trial are, (1) for misconduct of the defendant's counsel; (2) that the verdict was not sustained by the evidence and was contrary to law; (3) for newly discovered evidence if it was of such a character as to authorize the granting of a new trial, and (4) that the court erred in permitting the defendant's affidavit to be read as a deposition, "because the same was illegal and incompetent."

Turning to the assignment of errors we find they are as follows:

1. In permitting the affidavit of the defendant, Chiltén, filed on his motion for a continuance, to be read as evidence, the same being illegal and incompetent;
2. In giving instructions marked 1 and 2;

3. In refusing instructions marked A and B; 4. In refusing to grant a new trial "because defendant's counsel made certain statements to the jury, the same as set forth in the grounds for a new trial.

It will thus be observed that only two of the grounds for a new trial are embraced by the assignments of errors, viz.: (1) error in permitting the defendant's affidavit to be read as a deposition, and (2) in not granting a new trial on account of the alleged improper statements of the defendant's counsel to the jury.

These are, therefore, the only questions this court can consider on this appeal.

We do not understand counsel to contend that the statements in the affidavit were of themselves illegal or incompetent.

One of the counsel filed his affidavit on the motion for a new trial, in which he stated that the person, in lieu of whose deposition the affidavit was read, was dead at the time the trial took place, and that the fact that he was dead was unknown to counsel, and that the plaintiff was not present at the trial; and that if counsel had known that the person was dead they would not have consented to allow the defendant's affidavit as to what the witness would testify to be read as his deposition. He does not say the defendant knew he was dead, and even if the grounds for a new trial were sufficient to raise the question there would be no grounds for holding the defendant guilty of misconduct in procuring the affidavit to be read. That the witness may have been dead did not render the statements contained in the affidavit either illegal or incompetent.

Counsel differ somewhat in their statements as to what the defendant's counsel stated to the jury, and the latter states, and is not contradicted in it, that counsel for the appellant called his attention to the statements he was making, and that he then apologized for having gone out of the record and told the jury the matters referred to were not before them. The court makes no statement in the bill of exceptions as to what occurred, and as the motion for a new trial was overruled we do not feel warranted in reversing on that point alone.

Wherefore the judgment is *affirmed*.

Alexander, Baker & Reid, for appellant.

Lane & Harrison, for appellee.

J. M. GILES, ET AL. v. SAMUEL WHITE'S EX'R, ET AL.

Guardian's Liability.

Where, when a guardian takes charge of his ward's estate, a former guardian has loaned a part of the ward's money and taken a note with personal security, and the new guardian believing it to be safer, and in the exercise of his judgment, took a mortgage from the debtor on 320 acres of land to secure such debt, and released the old surety, it is held that the guardian is not liable for loss of such money when he acted in entire good faith, and did what a prudent man would have done in taking such mortgage.

Guardian Not Insurer of Ward's Funds.

The law does not require that a guardian shall be an insurer of the funds of his ward. He is only held to use his best skill, prudence and care in the management of his ward's property.

APPEAL FROM CHRISTIAN CIRCUIT COURT.

December 2, 1879.

OPINION BY JUDGE HINES:

Immediately upon the appointment of appellee as guardian he instituted an action to recover of the former guardian and his surety, Woodson, the amount due his wards, and in a few days thereafter caused attachments to be issued and levied on the property of Woodson, which attachments were, on hearing, discharged. After the answer of Woodson was filed appellee moved the court to grant him judgment for the uncontroverted part, which was refused, and therefore, the case being in equity, on motion of appellee Woodson was ruled to and did execute bond, with Moore as surety, to satisfy such judgment as the court might render. Subsequently, on the advice of counsel, Woodson executed a mortgage on 320 acres of land and upon some other property to secure the debt, and the action against Woodson was dismissed, and the bond of Woodson and Moore discharged after the mortgage to appellee as guardian was executed. Woodson executed another mortgage on the same property to one Jones for \$5,000, and on an action being instituted to foreclose the last mentioned mortgage, appellee and his wards were made parties. The land was first decreed to be sold to first pay the mortgage debt due appellee as guardian, and on sale under that decree the land failed to bring more than about one-half of the mortgage debt, the other property mortgaged having been consumed in discharging a prior lien. After the confirmation of that

sale appellants, the former wards of appellee, instituted this action against appellee and his surety on the guardian bond to recover of the guardian the amount due from Woodson at the time he executed the mortgage to appellee, and asking that the decree of sale in the case of Jones against Woodson be treated as a nullity on account of certain irregularities and errors appearing in the progress of the case. From a judgment dismissing appellants' petition this appeal was prosecuted.

The principal question is, Did appellee act in good faith and with sound discretion in taking the mortgage on the 320 acres of land in lieu of the bond of Woodson and Moore? At the time the mortgage was executed Woodson was considered solvent, owned considerable property, but was not, as stated by some of the witnesses, considered a safe business man. The surety on the attachment bond stated that he then considered him in a precarious condition. Within a few months after this, judgments to quite an amount were rendered against Woodson, and within a short time he was known to be insolvent. Moore, the surety for Woodson, was at the time supposed to be worth about \$7,000. The evidence tends to the conclusion that the land, at the time the mortgage was executed, was worth near \$25 per acre, and that at the date of the foreclosure it was worth, when sold upon the usual terms, from \$15 to \$18 per acre. The evidence also shows that at the sale, under decree of foreclosure, the land was purchased for the wards, appellants here.

It may be safely assumed that as a matter of fact Woodson was in a precarious financial condition at the date of the execution of the mortgage, and that Moore, in case he should be entitled to the statutory exceptions to which a housekeeper with a family is entitled, was not worth enough to satisfy the whole amount of the bond. That the court considered Woodson of doubtful solvency is manifested by the order requiring him to give bond to secure the indebtedness to the wards. That appellee did believe and had reason to believe that such was the financial condition of Woodson and Moore at the time the mortgage was accepted can not be doubted; and as there appears no reason for the refusal of the court to give judgment for the uncontroverted portion of the indebtedness, it is reasonable to suppose that the appellee anticipated a protracted litigation and a consequent danger to the wards' interest. Under these circumstances, can it be said that the debt due from Woodson was entirely safe, and that the bond of Woodson, with Moore as

surety, was a better reliance than a mortgage on real estate estimated at a thousand or more dollars than the debt to secure which the mortgage executed?

It appears to us that under such circumstances a chancellor would have approved or directed the investment of the funds of the wards in the more permanent investment of the mortgage security. The fact that time was given, by annual payments, for five years in which to satisfy the mortgage, ought not to alter the case. The land was then of value more than sufficient to pay the debt and interest, when the interest in the other mortgaged property is considered. But without reference to the other property, the greater portion of which was consumed in discharging prior liens, we think that appellee acted with as much prudence, skill and energy in securing the claim of his wards as the law demands. It was not his fault that it became necessary to institute proceedings against Woodson to recover the money of his wards. The action of the former guardian placed the funds in the precarious condition in which they were at the time of the execution of the mortgage, and rendered necessary the institution of proceedings to collect this sum. The law does not require that a guardian shall be an insurer of the funds of his ward. He is held to possess and to exercise the skill, prudence and energy, in the management of the moneys of his wards, that a man of good business capacity and experience would ordinarily exercise in regard to his own affairs of the same nature. Where the guardian has violated no statute in the investment of the ward's funds, the chancellor will require nothing more of him in such case than is here indicated.

It is quite true that something more than good faith on the part of the guardian is required, and that an ill-advised investment will not be sanctioned by the chancellor because counsel advised it, and the guardian thought he was doing the best thing for his wards. He must exercise a sound discretion, to be judged of by all the surrounding circumstances, and must be possessed of the capabilities above mentioned.

Nor does it appear to us that the fact that appellee may have been partly induced to make this settlement, by fear of suit for damages on the attachment bonds, should render him liable, provided the change of the investment was otherwise desirable, not in law, certainly, because the responsibility should not attach if he acted as a prudent and competent business man would have done under the

circumstances then surrounding him; and not in morals because the liability to suit upon the attachment bond resulted from an earnest and honest effort to secure the funds of the wards imperiled by the misconduct of a former guardian.

Suppose, as we have a right to assume from the evidence in this record, that appellee knew that Woodson was in failing circumstances and that Moore was not worth the whole debt if he claimed his exemptions, and that in the then uncertain state of things as to when the judgment could be obtained, and as to whether it would be satisfied when obtained, the mortgage had been offered and refused by appellee, and that subsequently any portion of the debt was lost, would not appellants' claim for reparation have been better founded both in law and morals? Such a dilemma leaves the competent and conscientious guardian without means to shield himself from loss. If such were the law, solvent, capable and honest guardians could not be obtained to assume such risks. The chancellor delights to watch and protect the interests of its infant wards, and to accomplish that end he likewise delights in shielding the competent and faithful guardian from losses resulting from unforeseen commercial disasters that no human foresight could provide against. This record develops the fact that whatever may be the defect in the title to the land, and we do not think any available defect is shown, the loss is not so readily traceable to the defect of title as to the general shrinkage of values.

The errors suggested in the case of Jones against Woodson are not such as to render the judgment void. A failure to describe the land by metes and bounds was erroneous, certainly, and might under certain circumstances authorize a reversal on appeal; but such an error has never been held to render the judgment void. The judgment for the sale of the land, as well as the judgment in favor of the appellee against the wards, must be treated as valid until reversed on appeal.

The judgment of the court below is *affirmed*.

Breathitt & Payne, S. J. Boyd, for appellants.

McPherson & Champlain, for appellees.

H. C. RICHARDS, ET AL., v. J. N. SEWARD, ET AL.

Description of Notes in Mortgage.

Where a mortgage expressly states the sum secured by it, and that it was to secure the mortgagee, the failure to describe the notes in the mortgage or to designate the parties to whom payable, does not invalidate the mortgage.

APPEAL FROM WARREN CIRCUIT COURT.

December 4, 1879.

OPINION BY JUDGE PRYOR:

The judgment is erroneous, as there is an entire absence of evidence showing that Pearce and Claypool were the sureties on any of the notes but one, and on that Claypool appears as the surety. The mere recital in the mortgage is no evidence of that fact, and as the pleadings stood the appellees should have been postponed in the payment of their claim until the debt of the appellants was satisfied.

The mortgage is sufficiently definite, as it expressly states the amount for which these parties were bound, and the failure to describe the notes or the parties to whom payable does not invalidate that instrument, if in fact the liability existed. The mortgage expressed that it was to secure the appellees in or about the sum of \$1,900, and this was sufficient to put the appellants on inquiry to ascertain the character of the claims for which the security was given.

The appellees, on the return of the cause, should be permitted to show their relation to the notes. If sureties, and if the debts were contracted in good faith, we see no reason why they should not be given a preference in the distribution of the proceeds of sale.

Judgment *reversed* and cause remanded for further proceedings consistent with this opinion.

J. W. & G. R. Gorin, for appellants.

J. H. & J. M. Wilkins, Halsell & Mitchell, for appellees.

H. B. RAY, ET AL., v. DAVID CLERNES.

Sale by Sample.

A sale by sample is a warranty that the balance of the articles so bought are of the same quality as the sample, and the buyer is not required to accept articles not of the same quality.

Instructions.

In a sale of wheat by sample an instruction was correct which told the jury "that if the sample had no weevil in it, but the wheat delivered did, and the defendant within a reasonable time examined it and found the wheat badly injured by weevils and notified the plaintiff to remove it, the law is for the defendant," etc.

. APPEAL FROM MARION CIRCUIT COURT.

December 4, 1879.

OPINION BY JUDGE PRYOR :

The instructions given at the instance of the appellee, if objectionable, were cured by the instruction given at the instance of the defendants.

The sale by sample was in effect a warranty that the balance of the wheat to be delivered should be of the same quality, and if the wheat was received by the appellants without a knowledge of its inferior condition, by reason of its having weevils in it, it does not affect the liability of the appellants on their warranty. But if they do receive it with such knowledge it must be regarded as having been accepted by them in the full discharge of the agreement to deliver the quantity and quality warranted. In this case there is proof conducing to show that it was badly injured by the weevils, and that fact was unknown to the appellants when delivered; but on the other hand the proof conduces to show that it was the quality of wheat warranted by the sample. The court, with a view of meeting the case as presented by the appellants, told the jury "that if the sample had no weevil in it, but the wheat delivered did, and the defendants within a reasonable time examined it and found the wheat badly injured by weevils and notified the plaintiff to remove it, the law is for the defendants," etc.

This was the only instruction asked by the defendants, and gave to the jury all the law of the case to which they were entitled. The instruction given for the appellee was the converse of the instruction given for defendants, that although there were no weevils in the sample, yet if the defendants, with a knowledge of there being weevils in the wheat, received it as a compliance on the part of the appellee with his contract they must find for the plaintiff. The appellants certainly had the right to receive the wheat, although full of weevils, as a discharge of plaintiff's obligation to deliver wheat of a particular quality, and if they received it knowing that it was in this condi-

tion they ought not afterwards to complain. Whether they knew its defective or injured condition was a question for the jury.

Judgment *affirmed*.

W. B. Harrison, for appellants. R. H. Rountree, for appellee.

JOSEPH WHITESIDES, ET AL., v. WILLIAM D. CUSHENBERRY, ET AL.

Husband and Wife.

The husband has a right to sell his real estate regardless of his wife's wishes and can pass to the purchaser a complete title except the potential right of dower.

Relinquishment of Homestead.

Where in a conveyance of a husband's real estate he agrees to relinquish his homestead right and the value of the homestead is credited on the purchase-money, he cannot thereafter assert a homestead claim as to such real estate.

APPEAL FROM SIMPSON CIRCUIT COURT.

December 5, 1879.

OPINION BY JUDGE PRYOR:

Upon a reconsideration of this case we must adjudge that the appellant by his own action has deprived himself of the right to a homestead. It is immaterial whether his wife consented to the sale or not. The husband had the right to sell regardless of his wife's wishes, and could pass to the purchaser a complete title, except the potential right of dower.

He bought this land at the sale by the assignee under the announcement that he would relinquish the homestead. The sale was made and confirmed, and the value of the homestead credited on the purchase money, leaving something over eight thousand dollars due. When his notes for the purchase money are attempted to be enforced he again claims the homestead, and if allowed the homestead out of the land, or is credited by a thousand dollars, its value, he reduces the amount owing to him to seven thousand dollars, and thereby will have had two homesteads in the same land.

He had the right to purchase the land, and when the sale was confirmed it could not well be avoided, or at least it must be regarded as a valid sale, and in the attempt to collect the purchase money he can assert no homestead claim.

The judgment below was therefore proper and should have been affirmed.

A. Duvall, G. W. Whitesides, J. M. Galloway, for appellants.

R. Rhodes, Bush & Goodwin, William Lindsay, for appellees.

HARRIET FRANCES v. ABE ADAMS.

Dower Estate Subject to Sale.

When dower is assigned it becomes liable to sale on execution like any other legal estate.

Abandonment of Homestead.

Where the owner of real estate removes from the land without any intention to return to reside on it, she thereby abandons her right to claim a homestead exemption therein.

APPEAL FROM CALLOWAY CIRCUIT COURT.

December 5, 1879.

OPINION BY JUDGE COFER:

Dower, when assigned, is subject, like any other legal estate, to sale under execution. The appellant ceased to reside on the land at least two years before the fi. fa. issued, and that, too, without any intention, as far as appears, to return to reside upon it. That was an abandonment of the homestead exemption. *Carter, Fisher & Co. v. Goodman*, 11 Bush 228. The case is not like that of *Phipps v. Acton*, 12 Bush 375. There the homestead was owned by the husband, and was continued after his death for the benefit of his widow by the express provision of the statute, which, as to such a homestead, does not require continued residence thereon. In this case the husband never had a homestead in the land. He died long before the homestead act was passed, and whatever right of exemption the appellant had was her own, and was not derived from her husband, and she is in precisely the same condition she would have been if she had held a life estate derived by purchase or lease from a stranger. The court, therefore, properly overruled the motion to quash the sale.

The value of the timber cut since the appellee purchased as proved by the evidence, did not exceed \$65 or \$70. S. H. Frances, whose deposition was taken by the appellee, and who seems to testify with great candor, and names nearly or quite all the persons proved by any witness to have gotten any of the timber off the land, says

Blakey got \$3 worth of logs, Loveger \$6, Wylie Rogers \$1.80, Paschal \$1, Sam Rogers \$12, Farless \$16.80, the two Brocks \$4, Smith \$6, Witness \$6.80, Brooks 700 rails, \$1.25, Ford 600 rails, \$1.50, Jones 500, \$1.25, Blakey 75 cents.

Jones, one of the defendants, proves that he bought 100 logs at 15 cents; that he cut 90 of them and hauled away 40, and left the remainder on the ground, and they were adjudged to the appellee. Farless cut a few logs and made a few rails, and they also remained on the land and were adjudged to the appellee. There may have been some other small lots of logs and rails sold since appellee purchased, but it is not certain that all that we mentioned was cut after that time, so that our estimate is rather above than below the actual full value of the timber sold from the land since the appellee made his purchase. He owns an interest in two-thirds of the reversion which is subject to the life estate of the appellant, who is about 50 years of age. It does not appear that the timber cut was of the value exceeding the prices for which it was sold, or that the reversion has been materially injured by removing it. When all these facts are considered, we think the timber cut and remaining on the land, and which was adjudged to the appellee, will fully compensate him for the injury that he has sustained, and that no judgment should have been rendered in his favor except permitting him to remove the cut timber, and enjoining the appellant from cutting or allowing others to cut from the land more timber than is reasonably necessary for firewood for herself or tenants residing on the land, and to keep the improvements on it in proper repair.

Judgment *reversed* and cause remanded for a judgment in conformity with this opinion.

L. Anderson, for appellee.

GEORGE HIGHBOGH v. JOHN R. HIGHBOGH.

Right of Action Against Co-Executor.

One executor cannot institute an action at law against his co-executor for the recovery of property belonging to the estate, for one executor has as much right to the possession as the other. When it becomes necessary to sue a co-executor the proceeding can only be brought in equity.

APPEAL FROM HART CIRCUIT COURT.

December 5, 1879.

OPINION BY JUDGE PRYOR:

It must be conceded that one executor cannot institute an action at law against his co-executor for the recovery of property belonging to the testator. One, having as much right to the possession as the other, will necessarily defeat any such recovery. The case before us is not at law but in equity, and on the part of one executor against another, who refuses to execute the trust and is claiming to hold the property of the testator in his own right. Choses-in-action and moneys that under the will are to be applied to the payment of specific devises made by the testator, and without which the trust imposed on the fiduciaries cannot be executed, are being withheld. It is as much the duty of one executor to execute the provisions of the will as the other, and of all the executors to see that the wishes of the devisor are carried out. In this case it becomes necessary to have a construction of the will or the direction of the chancellor as to the payment of certain legacies. The widow had renounced the provisions of the will; some of the property devised had been sold by the testator prior to his death; the claim by the widow of her distributable share of her estate rendered it doubtful as to the sufficiency of the personal estate to pay the special legacies, and under such circumstances it was eminently proper that a faithful executor should go into a court of equity for advice from the chancellor and also to know of his co-executor why he was claiming in his own right a large amount of moneys or choses-in-action belonging to the estate. This was his only remedy, and we see no objection to the jurisdiction of the chancellor to the character of the proceeding adopted by the appellee for the settlement of the estate. The devisees were all made defendants to the action, and the litigation between the two executors must necessarily be final as to all the parties interested.

It is alleged in the petition that the county bonds and moneys belonging to the testator were in the possession of the appellant, and that he was claiming them in his own right. This claim necessarily obstructed, until settled, the execution of the provisions of the will, and there can be no question but that the statements of the petition if true entitled the appellee to the relief asked. All the authorities when determining that the right of possession, as well as the title, is vested in all the executors alike, indicate that when it becomes necessary to sue a co-executor the proceeding must be in equity. Grounds, of course, must exist for equitable relief, and they certainly exist in this case.

The answer of the appellant, although made a cross-petition, is in effect a denial only of the allegations in the original petition. Under the present system of pleadings a reply might be necessary, but under the old code the answer in this case made the issue. The appellee alleges that the notes and bonds belonged to the estate. The appellant denies this fact and alleges a gift to him by the testator of the property claimed. If the answer is to be regarded as a cross-petition or counterclaim, it is evident from the record that a demurrer was interposed to the answer as a cross-petition and counterclaim, from the fact that we find no order from which the appellant excepts to the action of the court in sustaining a demurrer to the cross-petition and counterclaim. It is true the demurrer is not found in the record, the proceedings below being so defectively transcribed by the clerk as to render the record almost unintelligible, yet no exceptions would have been taken, as we must presume, unless a demurrer had been entered. It is also evident that the reply filed by the widow traversing the statements of the answer and marked "filed" was regarded by the parties as a part of the record, and treated as if filed in open court. This, however, we regard as immaterial, and will consider the questions presented upon the idea that the petition and answer made such an issue under the old code as authorized the judgment.

The testator, it appears, was possessed of a large estate, and left his wife surviving him. Having no children, the devises were made to his own kindred, and his brother George, the appellant, made his residuary devisee. It is manifest from the whole testimony in this case that the testator for many years prior to his death, and after the accumulation of a considerable estate, fearing that he might be robbed of his bonds and notes, was in the habit, particularly when leaving home, of placing them in the custody of some of his kindred for safe keeping. He and his wife were living alone on his premises and it was not unnatural that he should use this precaution in preserving the accumulations of a life of much toil and labor. The county bonds, amounting to near \$15,000, his brother George had the custody of for several years prior to his death, the testator going to his brother George's and obtaining the coupons when due, and occasionally bringing the bonds home with him and again returning them. A few months prior to his death he sent his wife to his brother after the bonds, they were delivered to her, and by her delivered to the old man, and were found in his possession at his death.

No claim was asserted by the appellant to these bonds for some time after the death of his brother, and not until after he ascertained that the widow intended to renounce the provisions of the will, and then he claimed, seeing, no doubt, that it would lessen his residuary interest, that the testator had long prior thereto given to him these bonds, retaining the right to the interest on the coupons as long as he lived.

The gift is proven by the declarations made by the testator to members of appellant's family and to one Watkins, and expressly established by the statement of one of appellant's sons. The appellant says the bonds were given him previous to the year 1872, and when in his possession the testator applied for them to exchange for other bonds that were drawing more interest. He gave him the bonds, and when they were returned by the testator, doubting his ability to prove the gift in the event of his brother's death, he made that suggestion to him, and the latter (his brother) called Jim, the son of appellant, and said he would fix the matter all right; stated that there was \$10,200 of the bonds, and said to Jim, "I want you to be a witness that I give these bonds to your father over and above his part of my estate," and said to Jim, "Don't you forget."

With all this proof at the command of the appellant no claim is made until weeks after the death of the testator, and after a statement made to parties entirely disinterested by appellant, when talking to appellant or he to them of the value of the estate, that the testator left about \$15,000 in county bonds. After detailing the manner of the gift, and upon the cross-examination by appellee's counsel, when asked to describe the bonds, he says he never opened the bundle nor made any examination of the contents of the package during the whole time he had it in his possession, and when he does open it he finds that it contains \$13,200 in bonds, instead of \$10,200. This was after the appraisal, and while the manner of the gift, as stated by both the appellant and his son, casts a suspicion on the whole transaction, the statement by the appellant that he never examined the package, nor knew how much it contained, but adds to the conviction forced upon the mind by the entire evidence in this record that the claim on the part of the appellant had its origin after the death of the testator, and with a view of securing to himself the larger portion of the estate. The box of gold and silver that he obtained but a few days before the death of the testator but strengthens this conclusion. This box of money the testator had kept in his

wheat bin, and on the occasion of his brother's visit he told him, as the widow swears, to get the box in order that Dave Highbogh, another relation, might take the money and exchange it for greenbacks, and when leaving with the box he told him to retain it until the testator saw Dave, as he thought he could suggest to Dave a plan by which he could make a better trade for the greenbacks than if left to himself.

This is denied by the appellant, who says that he has no recollection of the conversation, but that the old man called him to his bed and pulling his head to his, told him he could have it, it was his. The statement of the widow is plain and natural, and carries with it the semblance of fairness and truth; and the proof showing that the gifts made by the testator to his kindred were open and not concealed, known by neighbors and kindred, the statement made by the appellant is incredible. The widow says that when she went after the bonds shortly before her husband's death that she called for John's bonds and they were delivered, no claim made by the appellant, nor any ever made known until it was understood she proposed to renounce the provisions of the will.

The chancellor below knew all the witnesses in this case, and was in a better condition to judge of the surroundings than this court, and in our opinion it is not necessary to look beyond the evidence as spread upon the record to satisfy any one, however ignorant he may be of testifying, that this claim of the appellant has no foundation in fact, and the judgment was therefore proper.

The exhibit filed with the record purporting to show that he had given away these county bonds is evidently not the exhibit referred to by the witness, John Highbogh. This can be seen by the examination in chief, as well as the cross-examination, and while the affidavit of counsel cannot be read to supply the record, we have had no trouble in seeing that it forms no part of the gifts alleged to have been made by the testator. While the appellee may have had no right to unite his co-executors as plaintiffs, they were made defendants, the issue tried and a judgment rendered. The same is now affirmed.

Reid & Twyman, W. P. D. Bush, for appellant.

A. B. Montgomery, for appellee.

WILLIAM GAY NEESON'S G'D'N, ET AL. V. ELIZA YOUNG, ET AL.

Construction of Will.

A legatee is a person to whom a legacy is bequeathed, and this is true whether the person be named or merely described in the will; and when a bequest is made to the "heirs of my deceased brother," the word "heirs" is not used to designate a class or collective body, but as a designation of each of said legatees.

APPEAL FROM LOUISVILLE CHANCERY COURT.

December 5, 1879.

OPINION BY JUDGE COFER:

Counsel are agreed that, the nominated executor having declined to qualify, the chancellor could not exercise any discretionary power the executor might have had under the 15th clause of the will, and must divide the residuary estate between those who are "legatees resident in this country" within the meaning of that clause.

The learned counsel for the appellants in an elaborate brief prepared with great care and presenting his views with a clearness and perspicacity that have greatly assisted the court in the examination of the case, maintains that as the appellees are not named in the will except by the designation of "heirs of my deceased brother Robert" they are to be treated as collectively constituting one legatee, within the meaning of the 15th clause. The point of his argument will be best stated in his own language. He says, "Appellants insist that the testator use the collective noun 'heirs', to designate a class or collective body; and that the bequest of \$30,000 (in the 7th clause) was but one legacy, made to the single class or collective body, designated by the collective noun 'heirs'; that the bequest of the one legacy having been made to the class or collective body, the individuals who compose that class or collective body were only entitled to the legacy through that medium, and not as individual legatees under the will. In other words, the testator made the class a legatee, and not the individual members of the class individual legatees."

In this we think the counsel is in error.

A legatee is a person to whom a legacy is bequeathed, and this is true whether the person be named or merely described in the will. and it can make no difference whether each be described singly or several be described by designating a class to which they all belong. At the time of the testator's death there were four persons answering

the description of "heirs of my deceased brother Robert," and each took an aliquot part of the sum devised, which is directed to be divided among them equally. Therefore each one of these heirs is a devisee. This is well illustrated by the fact, that will not be disputed, that payment could only be made to each one separately, and the whole \$30,000 could not have been legally paid to one. In other words, though the devisees were described by designating a class to which they belonged, each one of the class was a devisee.

Counsel makes some reference to evidence in the record showing that the testator was not personally acquainted with the heirs of his brother Robert, and most probably did not know how many there were or their degree of relationship to him. This is no doubt true, as may well be inferred from the will itself, but we do not perceive that the facts can have any legitimate bearing upon the question.

The testator, in the 7th clause, made the heirs of his brother legatees, and in the 15th clause he directed his residuary estate to be distributed "to the legatees resident in this country." Who are legatees is to be ascertained from the will. About that there is no ambiguity. But all the legatees are not to share in the distribution of the residuary estate. Only such as are residents in this country. There is a latent ambiguity, and parol evidence was admissible to show which of them resided in this country and which resided abroad, but was not competent to show who was and who was not a legatee within the meaning of the 15th clause. That is wholly a matter of construction.

The judgment of the court conforms to the conclusion reached by this court and is *affirmed*.

Humphrey & Marshall, for appellants.

Bullock & Anderson, for appellees.

M. F. DE GRAFFENRIED v. A. RICE, ET AL.

Recovery on Attachment Bond.

Where an attachment is levied in June and held until the following January when the suit was dismissed and during that period some of the property was injured and lost the bondsmen are liable for such damages.

APPEAL FROM LYON CIRCUIT COURT.

December 6, 1879.

OPINION BY JUDGE HINES:

As we understand the judgment of the court below it is found as a fact that there was sufficient cause for obtaining the attachment, but that appellants are liable for the damages resulting from holding the property under the attachments for a length of time not justified by the circumstances.

The evidence shows that the attachment was held over the property from the 30th day of June, 1876, until the 8th day of January, 1877, at which time appellant dismissed his action, without a disposition of the attachment the grounds for which had been controverted, upon the supposition that the court in which the action was pending had no jurisdiction. The logs attached were liable to injury and loss, and were injured and some of them lost by reason of continuing the attachment longer than appellant was justified in doing. But whether that be the case or not we think is immaterial. The dismissal of the action after the grounds are controverted is equivalent to an adjudication that the attachment was improperly obtained, and renders the parties to the bond liable for such damages as may have been suffered by suing out the attachment. That the order dismisses without prejudice should not be allowed to affect the question as to whether the attachment was wrongfully obtained. The issue was made as to whether the attachment had been wrongfully obtained, and the defendant in the attachment had the right to a disposition of that question in the forum selected by the plaintiff, and the plaintiff's failure to have the court pass upon it in terms is a waiver of the right to raise that question in another court.

This is upon the supposition that the court had jurisdiction to try the question. If the court had no jurisdiction to grant the attachment and to adjudicate the rights of the parties then the process issued by the court will not protect the parties. The whole proceeding is void, and the attachment was manifestly wrongfully obtained, and the bondsmen are liable for all damages resulting from the issuance and levy of the attachment.

In any aspect of the case we think it manifest that the conclusion of the court below is correct, and that the judgment should be affirmed.

J. B. Husbands, for appellant.

SALLIE B. COTTON, ET AL., *v.* GEORGE WOLFE.

KATIE B. COTTON'S ADM'R *v.* SAME.

Guardian's Expenditures.

A guardian may not legally expend for his wards more than the income from their estate without first procuring from the court authority to do so.

Compensation of Guardian.

A guardian, or one assuming to be one, who has charge of his ward's estate, where he is guilty of gross mismanagement and conversion, is not entitled to any compensation for his services as such trustee.

APPEAL FROM LOUISVILLE CHANCERY COURT.

December 6, 1879.

OPINION BY JUDGE PRYOR:

This judgment must be reversed. Cotton, after his attempted qualification as guardian, which was on the 2d day of July, 1868, received of the estate of his wards \$3,777.84 on a note on Mrs. Sewell. He sold the bank stock, 14 shares for \$1,119, and received the proceeds of the Missouri land, \$845, making in all the sum of \$5,742.82. This must be regarded as the principal of the ward's estate upon which he should be charged interest. He took charge of that estate in good faith, but has so managed the property of these infants as to involve them in litigation, causing them to suffer great pecuniary loss, and therefore no allowance should have been made him for his services, nor credits given for making the settlements that the children are now attacking. The necessary expense incurred by these children in getting what is left of their estate will greatly exceed the claim allowed the surety in this case, in right of his principal, and that, too, when the principal is largely indebted to the children.

No such recusant fiduciary, if guardian in fact, would be allowed compensation under such circumstances. Both the allowance and the costs of this attempted qualification should have been refused as a credit. Nor should he at any time or for any period have been allowed any greater credit for expenditures than the income of the estate. How much of the income he should have been allowed to expend is a question this court must decide from the facts before us. So far as appears from the record all the property the children had, out of which anything could be realized, was the amount of moneys

received by Cotton after the execution of his bond and the rent of the real estate. While Cotton qualified in good faith, he was converting the estate of the infants to his own use from the moment he executed his bond.

What the vast expenditures made by the guardian consisted in does not appear, but in no event should the chancellor have permitted the real guardian to expend exceeding \$1,000 per annum for the support, education and maintenance of these three children. Their estate was small, and they should have been educated and clothed according to their circumstances in life. He credits these children with rent for the years 1868, 1869, 1870, 1871, 1872 and 1873, for a sum more than sufficient each year to educate and maintain them. Their expenses were decreased during the latter period of Cotton's administration, by the death of the oldest of the sisters, and yet, from the record before us, the rents are gone, the interest expended, and the principal encroached on until it is reduced to near \$1,500. Their income was more than ample to support them, and when Cotton had no legal right to interfere with either the principal or income, the chancellor finds himself searching for an equity to allow any credit for expenditures made, and particularly when Cotton was indebted largely to the wards, and for which he had not accounted when these expenditures were made, and still owes the debt. This is the troublesome question in the case, and to allow the expenditures is to regard him as a trustee by reason of his having acquired control of the funds in good faith, and to limit the liability of the surety on that ground. These expenditures this court will presume were made out of the trust fund. This alone distinguishes this case from the recognized rule that the law will apply the credit where there is more than one debt owing to the same party to the one most precariously situated. The children were also improperly charged with the taxes on the whole estate owned by themselves and their mother. It may be that Cotton withheld what was going to Mrs. Sewell, but if he did the children never derived any benefit from it. They are liable for only their part of the tax, and no more.

The money realized by Mrs. Sewell on the sale of the organ and mortgaged property, and applied to her individual debt, should not have been charged to the children. Mrs. Sewell may not have been entitled to it, but this affords no reason why the children should be charged with it when it was applied to her individual debt under an attachment in her name and for her debt. Neither the amount of

money, \$4,297.74, owing by Cotton prior and at the time of his qualification, nor the interest thereon, is not to be computed in making this settlement.

The provisions of the General Statutes with reference to guardians has no application to this case. Cotton was not guardian, but a voluntary trustee, and certainly had no right to expend any part of the principal of the children's estate without asking the chancellor. Upon such an income as is shown in this case a prudent and economical guardian would accumulate or add to the principal of the wards' estate, instead of diminishing it. The surety should be charged with interest at 6 per cent. upon the principal sum, as originally reported by the commissioner, and credited by the amounts expended at the time of payment. As no allowance has been made, interest will not be compounded.

The judgment is *reversed* on both appeals and cause remanded for further proceedings, etc.

Emmet Field, for appellants.

Ed Badger, Bigger & Davis, W. Weh Webb, for appellee.

ANNA RHODES, ET AL., v. WARREN DODSON'S ADM'R.

Will—Construction of.

All the terms used in a will should be construed together, and when a testator uses similar language in two clauses of his will he will be presumed to have intended the same in each instance; and when he intends to make a similar disposition of one part of his estate with that already made of another part he will be expected to use the same or similar language.

APPEAL FROM NELSON CIRCUIT COURT.

January 6, 1880.

OPINION BY JUDGE COFER:

That the children take an absolute estate in the one-third of the testator's estate devised to his widow for life is clear. The language is, "I leave to my wife one-third of my property, real and personal, during her natural life. After her death the same is to be equally divided between her three children." It is only the balance, or remaining two-thirds, which is to be divided between the three children, "to them and their children after them." No such limitation,

if it be a limitation, is applied to the one-third devised to the widow.

It is, then, clear that as to the one-third the children take an absolute estate and their children take no estate under the will. And we incline to the opinion that the testator did not intend to create a life estate in any of his children.

The words "to them and their children after them," if such words stood alone, would no doubt be sufficient to limit the interest of the first takers to a life estate. But the devise to the widow shows that when the testator chose to create an estate for life with remainder over he knew how to do so in apt language, and that he did not employ such language in reference to the two-thirds or balance of his property is strong evidence that he did not mean to create estates for life in that.

When a testator uses similar language in two clauses of his will he will be presumed to have intended the same in each instance; and for the same reason when a testator intends to make a similar disposition of one part of his estate with that already made of another part, we ought to expect him to use the same or similar language.

Moreover, the intention that the children shall take absolutely and without limitation the one-third interest devised to the widow being clear, we ought not to suppose, in the absence of language clearly expressing such an intention, that he meant to impose limitations upon their interest in the remaining two-thirds.

His estate is small, and he hardly intended to give one-third absolutely at the death of the widow, and to limit the interest in the other two-thirds to a life estate. We are therefore of the opinion that the judgment was not prejudicial to the rights of the appellants, and it is affirmed.

John H. Wathen, C. A. Wickliffe, for appellants.

THOMAS MCCLINTOCK, ET AL., v. DANIEL THOMPSON.

Wills—Devise Upon Condition Subsequent.

If property be devised to one with limitation over in the event he dies before reaching twenty-one years of age, or without issue, the devisee's title is absolute on his reaching twenty-one years of age, although he dies without issue.

APPEAL FROM BOURBON CIRCUIT COURT.

December 9, 1879.

OPINION BY JUDGE HARGIS:

Without attempting a review of the authorities it is sufficient now to say that, by a long list of the most eminent elementary and judicial writers, the rule has been well settled that, if property be devised to "A" with a limitation over, in the event he dies under the age of twenty-one years or without issue, and if he attains his majority, his estate becomes absolute and indefeasible, although he may die without issue. In such cases the court, with a view to effectuate the intention of the testator, will read "or" as "and."

Parrish v. Vaughan, 12 Bush 97, recognized this rule as well established by authority, but distinguished that case from those falling within the rule. After stating the general rule the court said: "But to support the view which appellants are here insisting upon it will be necessary to substitute 'and' for 'or', and also to ignore and disregard the words 'then and in either of these events', which are used in the same sentence and in direct connection with the word 'or', and apparently for the purpose of rendering definite and certain the idea the testator intended to express by the use of that disjunctive word."

That the court rested its decision on this distinct ground shows that the case was not intended to be a modification of the general and well established rule.

The judgment conforms to these views and must be affirmed.

Prall & Dickison, for appellants.

Breckinridge & Shelby, W. P. Ross, for appellee.

[Cited, *Darnell v. Crain's G'd'n*, 1 R. 354, 10 Ky. Opin. 829.]

JOHN F. HAWES v. COMMONWEALTH.**Criminal Law—Failure to Instruct.**

Where in the trial of a homicide case it is proper for the court to instruct the jury as to the law of involuntary manslaughter, and he fails to give such instruction, such failure cannot avail the appellant where the evidence is conclusive that appellant shot with intention to kill, for the failure to give the instruction could not therefore have prejudiced the rights of appellant.

APPEAL FROM BALLARD CIRCUIT COURT.

January 6, 1880.

OPINION BY JUDGE HINES:

We find no brief for appellant in this case, and after a careful reading of the record see no error of the court below in the ad-

mission of testimony nor in the giving or refusing of instructions. The only thing, that in any aspect of the case could be complained of, is the failure of the court below to instruct the jury as to the law of involuntary manslaughter; but that cannot avail appellant, because the evidence is conclusive that appellant shot with the intention to kill, and therefore the failure to give such instruction could not have been prejudicial.

Judgment *affirmed*.

Bugg & Bishop, for appellant. P. W. Hardin, for appellee.

COMMONWEALTH v. JAMES STEGALA.

Criminal Law—Indictment.

An indictment should not be dismissed on motion because of the failure of the clerk to sign his name to the endorsement on its back to the effect that it was filed in open court, where the record shows that the indictment was returned into court, was ordered filed, and prior to the dismissal the prosecution was once continued.

APPEAL FROM FULTON CIRCUIT COURT.

January 6, 1880.

OPINION BY JUDGE HINES:

The motion to dismiss the indictment in this case appears to have been sustained upon the ground that the name of the clerk was not signed to the indorsement on the back of the indictment to the effect that it was filed in open court. The code (sec. 121) requires that the indictment must be presented by the foreman, in the presence of the grand jury, and filed with the clerk; but it does not require that the only evidence of these facts shall be the signature of the clerk to the indorsement on the indictment. The record shows that the indictment was returned into court as required by Sec. 121, and was ordered to be filed, and that prior to the dismissal the prosecution was once continued. The order of the court to file the indictment is equivalent to filing, and is, in fact, a filing, of the indictment; and the signature of the clerk of the indorsement on the back of the indictment is intended to serve no other purpose than to identify the paper returned by the grand jury, which in this instance is sufficiently done by the indorsement of the foreman, to which reference is made in the order of the court.

Judgment *reversed*.

P. W. Hardin, for appellant.

GEORGE M. MILLER v. DANIEL, SR., ET AL.

Mortgages—Fraud.

Where a mortgage is executed to secure future advances, and a statement contained in it shows it was to secure the sum of \$150 that day advanced, which was not true, but thereafter \$54.55 worth of goods were advanced to the mortgagor, and it is not shown that the false statement was inserted for a fraudulent purpose or that appellant was misled by it to his prejudice, the mortgage is valid as security for the advances actually made on the faith of the mortgage.

APPEAL FROM BRECKINRIDGE CIRCUIT COURT.

January 6, 1880.

OPINION BY JUDGE HINES:

To appellee's allegation of fraud in the execution of the mortgage appellant denies the fraud and alleges that it was executed to secure him in advances which he was thereafter to make to Haycraft, and that on the faith of the mortgage security he supplied Haycraft with goods to the value of \$54.55. To this answer no response was filed, and therefore it stands admitted that the mortgage was executed in good faith to secure these advances, while it is also admitted that the statement on the face of the mortgage that it was to secure the sum of \$150 that day advanced is in fact untrue.

But unless this statement in the mortgage was inserted for a fraudulent purpose, or unless appellee was misled by it to his prejudice, it cannot affect the validity of appellant's lien for the advances actually made on the faith of the mortgage. The form of this mortgage to secure future advances is usual, and has frequently received the sanction of the courts. Sec. 374, 1 Jones on Mortgages. There is nothing in this record to show that the mortgage was either actually or constructively fraudulent. The court erred in postponing appellant's claim to that of appellee,—as between them appellee's claim should have been subordinate.

Judgment *reversed* and cause remanded with directions for further proceedings consistent with this opinion.

Williams & Powers, Barnes & Williams, for appellant.

Kinchelve & Eskridge, for appellees.

COMMONWEALTH v. JAMES SMOCK.

Criminal Law—Perjury.

Corrupt false swearing before a grand jury is perjury where the grand jury had legal authority to investigate the matter about which the witness testified falsely and the testimony was material.

Indictment.

In a prosecution for perjury against a witness who was sworn before a grand jury it is not necessary to aver in the indictment that the grand jury was sworn.

APPEAL FROM WASHINGTON CIRCUIT COURT.

January 7, 1880.

OPINION BY JUDGE COFER:

Although a grand jury is not a court, and an investigation before it is not a trial, yet the grand jury is a part of the judicial machinery, and an investigation by it is a judicial proceeding, and corrupt false swearing before it in respect to a matter being enquired of by it is perjury if it had legal authority to investigate the matter and if the false testimony was material.

Proceedings before those who are in any way interested with the administration of justice, in respect to any matter regularly before them, are considered as judicial for this purpose. Title of Perjury, Bouvier's Law Dict. And this seems to have been the understanding of our codifiers, and the general assembly by which the law was adopted. Sec. 110 Myers' Code; Sec. 113, Bullitt's Code.

The case of *Commonwealth v. Powell*, 2 Met. 10, does not decide that perjury may not be committed by false swearing on a motion for a new trial. All that is there decided is that such false swearing might be prosecuted under the statute, and as a statutory offense, and we may say the same here. Every perjury includes false swearing, and if the prosecution should elect to do so he might prosecute for the statutory offense in any case in which he could prosecute for perjury.

It was not necessary to allege that the grand jury was sworn, any more than to allege that a judge or clerk had been sworn when the oath was administered by either of them.

It is alleged that Wakefield was foreman of the grand jury, and that he had administered an oath to the appellee; and it must be presumed, until the contrary is proved, that the court did its duty and

caused the grand jury to be sworn. The alleged testimony of the appellee was clearly material, and the court erred in sustaining the demurrer.

Judgment *reversed* and cause remanded with directions to overrule the demurrer.

Hardin, for appellant. R. J. Brown, for appellee.

F. G. BEACH v. J. T. MARTIN'S TRUSTEE.

Construction of Terms of a Will.

A daughter takes only a life estate where it is stated in a will, after giving certain property to the daughter, that "But, as I have before stated, all that I give to my daughter, Mary, * * * is for her use and benefit during her natural life and then to the heirs of her body, if any, and if none, then to be disposed of as hereinbefore mentioned."

Allegations as to Right to Sue.

Allegations in a petition that one was appointed trustee by the Harrison Circuit Court is sufficient to show such trustee's right to maintain the action. The existence of the facts necessary to give that court jurisdiction to make the appointment, in the absence of anything to contrary, will be presumed.

APPEAL FROM HARRISON CIRCUIT COURT.

January 7, 1880.

OPINION BY JUDGE HINES:

It clearly appears to us that the court below did not err in adjudging that the will of J. Beach gave to his daughter, Mary, only an estate for life, with remainder to her child who survived her. The language of the will is: "But, as I have before stated, all that I give to my daughter, Mary, by this my last will and testament, is for her use and benefit during her natural life and then to the heirs of her body, if any, and if none, then to be disposed of as heretofore mentioned." The preceding clause of the will to which reference is here made reads: "All of the devise that I have made to my said daughter, or that I may hereafter make to her by this, my last will and testament, to her sole use and benefit during her natural life, and at her death to descend to the heirs of her body, if any, and if none to go to her brothers and sisters, if they are living, if they or either of them should be dead then to their children." These two clauses make the intention of the testator evident beyond question.

The allegation of the petition that Stone was appointed trustee by the Harrison Circuit Court is sufficient to show his right to maintain the action. The existence of the facts necessary to give that court jurisdiction to make the appointment, in the absence of anything to the contrary, will be presumed.

The special demurrer for defect of parties was properly overruled. The allegation that appellant had purchased the interest of the others, nothing to the contrary appearing, was sufficient to dispense with making them parties.

In reference to the other assignments of error we deem it sufficient to say that we perceive no error in the rulings of the court below that affect the substantial rights of the appellant.

Judgment affirmed.

J. I. Ward, A. H. Ward, for appellant.

Jas. E. Cantrill, John T. Morgan, for appellee.

JAMES H. JOUETT, ET AL., *v.* W. C. OWENS.

Husband and Wife—Husband's Debts.

A husband may use the money derived by him from his wife in paying his own debts or in purchasing property for his own use, and where the wife consents to such acts she will be denied relief therefrom.

Rights of a Wife.

Where a husband has used his wife's money to buy real estate, equity may be resorted to by the wife to require the land to be conveyed to her, but as against the vendor to whom such money has been paid she is not entitled to relief.

APPEAL FROM SCOTT CIRCUIT COURT.

January 7, 1880.

OPINION BY JUDGE PRYOR:

The testimony in this case conduces to show that the money paid to the appellee was the proceeds of the estate belonging to the married women, or was regarded by their husbands as belonging to them. When the land was purchased of the appellee they no doubt intended the investment for their wives, and when paid for, we see no reason why it cannot be secured to their use against any creditor of the husband of either. This, however, does not prevent the appel-

lee from enforcing his lien and subjecting the land to the payment of the unpaid purchase-money. The appellee may have known that the money paid him was the proceeds of the sale of the realty belonging to the feme coverts, or was money delivered by them to their husbands, to be applied as a payment on the land, and still the contract can be enforced, not as against the married women, but as against their husbands, whose competency to make the contract cannot be questioned. The fact that the contract was void as to the feme coverts will not authorize the chancellor to rescind it or decree that the appellee shall refund the money.

The feme coverts, having consented that the money should be applied to the payment of the debt of the husbands, and in fact having delivered it to them for that purpose or even paid it themselves to the appellee, on the idea that it was their contract, cannot now reclaim it. If the names of the feme coverts had not been affixed to the contract, and the husbands had received and paid to the purchaser this money, it cannot be maintained that they would have been entitled to recover, or that they could have asserted any legal or equitable claim against the appellee, for the reason that he knew it was their money. It was not a trust fund or held by the wives as their separate property so as to prevent their delivery of it to their husbands, or consenting that it should be used in the payment of their debts. If the contract had been with the wives alone, the chancellor would necessarily treat it as void, but when with the husbands the payment of the money by them, although they obtain it from their wives, is in discharge of their own obligation, and the fact that their wives' names are upon the paper as obligors cannot affect the appellee or render the entire contract void.

Considering the contract, therefore, as that of the husbands alone, and it can be regarded in no other light, being void as to the wives, it was a payment by their husbands. They had the right to convert it to their own use, and in this way it was delivered to the husbands and paid over at the wives' instance.

In the cases of *Lynam v. Green*, 9 B. Mon. 363, and *Faught v. Henry*, 13 Bush 471, the question raised in this case was directly settled, and we find no adjudication by this court looking to a contrary conclusion. That the husband may use the money derived by him from the wife in paying his own debts, or in purchasing real or personal property for his own use, cannot be doubted, and when by the consent of the wife, it presents stronger reasons for denying to

her any relief, and the fact that she was a party to the contract, cannot affect the determination of the question made. There is no judgment sought against the feme coverts, and the case as presented is: Can the husbands apply the money of the wives, derived from the proceeds of their own estates or otherwise, in purchasing property for themselves for their joint use? To this an affirmative response must be made, and particularly when the wives have assented to the payment of the money.

No fraud in obtaining the money is alleged or proven. The money, in fact, when the husbands obtained the possession of it, was theirs, and even if the entire payment had been made by the married women it would have been regarded by the chancellor as in discharge of their husbands' liability. The equity of the wives against the husbands could be maintained, and the land ordered to be conveyed to them, but as against the vendor of the land to whom the payment has been made the appellants are not entitled to relief.

The judgment is therefore *affirmed*.

Geo. E. Prewitt, W. S. Darnaby, for appellants.

J. F. Askew, William Lindsay, A. Duvall, W. C. Owens, for appellee.

THOMAS SIMMS *v.* COMMONWEALTH.

Criminal Law—Indictment for Furnishing Intoxicating Liquor to an Inebriate.

It is not material whether intoxicating liquor be charged in an indictment to have been furnished by selling, giving or loaning, or whether it be proven to have been furnished in the manner charged. If furnished to an inebriate at all the statute was violated, and a defendant is not mislead to his prejudice by being charged with selling when in fact he gave or loaned it only.

APPEAL FROM WASHINGTON CIRCUIT COURT.

January 7, 1880.

OPINION BY JUDGE COFER:

We are unable to see in what way the rights of the appellant could have been prejudiced by the discrepancy between the name of McElroy as given in the indictment and as proved on the trial. But the instruction No. 1 given by the court, in which the jury were told that if he sold or gave whisky to Chas. McElroy, etc., was not objected

to; and the instruction having been given on motion of the attorney for the commonwealth we cannot consider the exception. Sec. 282, Criminal Code; *Loving v. Warren County*, 14 Bush 316.

The words added by the court to instruction No. 2 did not change the legal effect of that instruction and were not prejudicial to the appellant. The words, "or in the habit of becoming intoxicated by the use of spirituous liquors," added to instructions Nos. 3 and 4, are in the statute and in the indictment and were properly added to these instructions. The words "or gave" were also properly added. The act denounced by the statute is the furnishing of whisky or other intoxicating drink to an inebriate, and the words "sell," "give," and "loan" were merely inserted in order to embrace every mode or manner of furnishing such persons with liquors. It is not material whether it be charged to have been furnished by selling, giving or loaning, or whether it be proven to have been furnished in the manner charged. If it was furnished the statute was violated, and the defendant cannot be misled to his prejudice by being charged with selling, when in fact he gave or loaned, or vice versa.

Wherefore the judgment is *affirmed*.

J. W. Lewis, for appellant. Hardin, for appellee.

COMMONWEALTH v. H. C. ROGERS, ET AL.

Criminal Law—Joint Indictment.

It is not necessary to the conviction of one jointly indicted with another that both should be proven guilty, but where a separate offense by each be proven, unless the state will dismiss as to one, both must be convicted.

Single Offense.

Only one offense can be embraced in a single prosecution.

APPEAL FROM CUMBERLAND CRIMINAL COURT.

January 7, 1880.

OPINION BY JUDGE COFER:

There was no error in instruction No. 1. The indictment was joint, and there was no evidence conducing to prove a joint offense, but if the evidence conduced to prove an offense at all it was an offense committed by each at different times, and having no connection with each other. This did not appear on the face of the indictment.

ment. It came out in the evidence and could only be taken advantage of by instructions. It is certainly not necessary to the conviction of one jointly indicted with another that both should be proven guilty. But if a separate offense by each be proved then, unless the attorney for the commonwealth shall dismiss as to one, both must be acquitted. Otherwise all who may have committed breaches of the peace within the county within one year previous to the indictment might be jointly indicted and put upon trial together, and each be convicted of a breach of the peace having no connection with the offense committed by any other. This would lead to confusion in trials and would burden any one convicted of the costs not only of the prosecution against himself, but with the costs against all others who might be acquitted, and would violate a fundamental rule of criminal procedure, which requires that only one offense shall be embraced in a single prosecution.

Judgment affirmed.

Hardin, for appellant.

JOHN T. HIGGINS *v.* COMMONWEALTH.

Criminal Law—Intoxicating Liquor.

One not an employe or agent for the holder of license to operate a tavern cannot, as a defense to a charge of keeping a tippling house without a license, rely upon the license of another to protect him. The statute forbids the assignment of a license to retail liquors.

APPEAL FROM GARRARD CIRCUIT COURT.

January 8, 1880.

OPINION BY JUDGE HARGIS:

Mrs. Mason obtained license to keep tavern with the privilege of retailing liquors. Afterwards, while the license was in force, she rented her bar-room connected with the tavern to the appellant for the sum of \$40 per month, and the payment by him to her of \$200, the license fees to the trustees and to the state.

He retailed liquors in pursuance of his contract, and was indicted and fined \$60 for keeping a tippling house. At the trial he relied upon the license of Mrs. Mason to protect him. The statute forbids the assignment or transfer of license to retail liquors.

Appellant had no right to sell liquors in the bar he had rented

from her for that purpose, without first having a license to himself to do so, and as she could not legally assign or transfer her license to him, his plea constituted no defense to the prosecution.

Wherefore the judgment is *affirmed*.

R. M. & W. O. Bradley, for appellant. Hardin, for appellee.

B. F. MORAN, ET AL., v. COMMONWEALTH.

Principal and Agent.

No one is bound as surety, by the act of an agent unless the authority of the agent is in writing, signed by the principal.

Where one whose name is signed to a writing by an agent is sued on the writing, he can only raise the question as to the agent's authority by pleading; and where he pleads non est factum it must then be shown that the agent was empowered by writing to sign the defendant's name.

APPEAL FROM FRANKLIN CIRCUIT COURT.

January 8, 1880.

OPINION BY JUDGE COFER:

The record shows that the notices were mailed as required by the statute, the defect in the record as originally filed having been cured by certiori on which copies of the notices and the auditor's certificate upon each has been brought up.

The statute declares that no person shall be bound as surety by the act of an agent, unless the authority of the agent is in writing, signed by the principal. But when a person whose name is signed to a writing by an agent is sued on the writing, he can only raise the question as to the authority of the agent by pleading. If he pleads non est factum it must be shown that the agent was empowered by writing to sign his name, but until he does plead the signature will be treated as properly made. There is no plea in this case nor anything which made it the duty of the commonwealth to prove that the agent had a written power of attorney to sign the name of York.

The amount of the judgment is fixed, and the 2% for the attorney general's fee may be ascertained by a simple calculation, such as is to be made in ascertaining the amount of interest due on a judgment.

Judgment *affirmed*.

P. Palmer, J. W. Dycus, for appellants. Moss, for appellee.

CINCINNATI SOUTHERN R. CO. *v.* W. H. DAUGHERTY.**Damages and Negligence.**

In a suit for damages against a railroad company for killing an animal, there can be no recovery if it be shown that the employes operating the train exercised ordinary vigilance to prevent the injury. They were not required to stop the train to prevent the injury if to do so would have endangered the lives of passengers.

Disturbing the Jury's Verdict.

This court will not disturb the verdict of a jury where there is some evidence to sustain it, even though the court may think the weight of the evidence the other way.

APPEAL FROM GRANT CIRCUIT COURT.

January 8, 1880.

OPINION BY JUDGE PRYOR:

It was with the jury to determine the question of negligence, and the proof on the part of the plaintiff conducing to show a want of ordinary diligence, this court will not disturb the verdict, although the weight of the testimony is with the defendant. Nor do we see any objection to the instructions given by the court, or any error to the prejudice of the appellant in refusing the instructions asked. The statement in the instruction to the effect that the horse was in peril did not affect the question of negligence. That the animal was in danger is evidenced by the fact of its being killed by the train of the appellant, and whether this could have been prevented by the exercise of ordinary diligence was the only question for the jury to determine. If the employes on the train could have prevented the accident it was their duty to have done so, and the exercise of ordinary vigilance was all that was required of them by the instruction given.

Instruction No. 4 proceeded to tell the jury, in substance, that the safety of those on board the train was to be first considered, and the effort to prevent the killing of the animal by stopping the train was not required if it endangered the lives of the passengers. The instructions asked by the defendant and refused were, in substance, the same as those already given, except one or two containing mere abstract propositions of law, and were on that account properly refused. It was not proper that the court should attempt to define the duty of the engineer further than to say that it was his duty to avoid the destruction of the appellee's property if by ordinary care he could have prevented it.

We see no reason for disturbing the judgment below either upon the original or cross appeal. The jury could not have been misled by any of the instructions given. It was a plain issue of fact presented by the pleadings and the instructions, and while the evidence of negligence is not of the most convincing character, this court cannot undertake to say that the verdict is without proof to sustain it.

The judgment below is *affirmed* on the original and cross appeal.
J. M. Collins, for appellant. A. G. De Jeanette, for appellee.

ROBERT ANDERSON v. COMMONWEALTH.

Homicide—Malice.

While it is the better rule for a trial court in the trial of a homicide case to omit any definition of malice, still, where the court does attempt to define it and it does not appear that it could have mislead the jury to the defendant's prejudice, this court will not reverse on account of it.

Voluntary Manslaughter Instruction.

An instruction regarding voluntary manslaughter is technically incorrect in apparently restricting the law to a case when the heat of passion was produced by a blow or trespass to the person killing. The passion must arise from what the law regards as an adequate cause, and there may be other causes than a trespass or a blow.

Death from Wound.

Every person is held to contemplate and to be responsible for the natural consequences of his own acts. But where a wound inflicted is not dangerous in itself, and death results from improper treatment or from disease subsequently contracted, not superinduced by or resulting from the wound, the accused is not punishable for homicide.

APPEAL FROM JEFFERSON CIRCUIT COURT.

January 8, 1880.

OPINION BY JUDGE HINES:

Appellant complains of instructions 1, 2, 3, and 4, as abstract propositions of law, unauthorized by the evidence and misleading to the jury. So far as 1 and 4 are concerned we are of the opinion that they not only present the law properly, but that the evidence in the case rendered it necessary to so present it. While in our opinion it would have been better in this case as in all others to omit any

definition of malice as attempted in the second instruction, yet it does not appear that it could have been misleading or in any way prejudicial to appellant. It must appear to this court that the error complained of operated to the prejudice of the accused before we will reverse on his appeal. (*Bush v. Commonwealth*, 78 Ky. 268.)

The third instruction in regard to voluntary manslaughter is substantially correct, yet technically incorrect in apparently restricting the law to a case when the heat of passion was produced by a blow or trespass to the person killing. The passion must proceed from what the law regards an adequate cause, and while there may be other causes than a blow or actual trespass to the person killing, yet there is nothing in this record to indicate the existence of any such cause, nor to authorize the jury in finding that there was heat of passion unless produced as indicated in the instruction.

The facts of this case, taken with the finding of the jury, do not demand an instruction as to the law of involuntary manslaughter. The jury were instructed in the law of voluntary manslaughter,—killing without malice,—and they found that the killing was done with malice and fixed the highest punishment known to the law. They found as a matter of fact that malice did exist when they were told that they might find that the killing was done in the absence of malice, and it could not therefore have changed the finding on this point to have instructed in the lower degree of manslaughter. *Mitchell v. Commonwealth*, 78 Ky. 219.

As to the 5th instruction applied to the facts of this case, we are of the opinion that it is substantially correct. In *Bush v. Commonwealth*, 78 Ky. 268, it is said: "The rule of the common law would seem to be, that if the wound was a dangerous wound, that is, calculated to endanger or destroy life, and death ensued therefrom, it is sufficient proof of murder or manslaughter; and that the person who inflicted it is responsible, though it may appear that the deceased might have recovered if he had taken proper care of himself, or submitted to a surgical operation, or that unskilful or improper treatment aggravated the wound and contributed to the death, or that death was immediately caused by a surgical operation rendered necessary by the condition of the wound."

The principle upon which this rule is founded is that every one is held to contemplate and to be responsible for the natural consequences of his own acts. But if the wound is not dangerous in itself, and death results from improper treatment or from disease

subsequently contracted, not superinduced by or resulting from the wound, the accused is not punishable for homicide.

The wound in this case was of such a nature as to render it reasonably certain that death would result therefrom unless prevented by surgical aid, and therefore of such a character as to render such aid proper and necessary. Not only was surgical aid necessary, but the wound was of such a nature that immediate relief was absolutely essential to the preservation of life. If death had resulted without surgical aid being called, or before it could be brought to bear, it is clear the accused would have been guilty of murder, as he would have been if the blow had resulted in instant death. Under such circumstances nothing more is required under the law than is specified in the fifth instruction. The jury was given the law substantially as we have intimated in the *Bush* case, and as favorably to the appellant as he has a right to ask, and in such a way as not, in our judgment, to be misleading.

The sixth instruction is as favorable to appellant as he has a right to demand, and in our judgment, more so.

There was no error in refusing instructions. The whole law applicable to the facts of this case was fully presented, and it appears to us that appellant has had a fair and impartial trial, and that the judgment of the court below should be *affirmed*.

R. H. Thompson, for appellant. Hardin, for appellee.

JESSE S. SINCLAIR'S ADM'RS, ET AL., *v.* MARY SINCLAIR.

Husband and Wife.

Where it is not shown that a husband received money arising from the sale of his wife's property, under an agreement to invest it for her benefit, or that he received it under such an agreement with any one, it is held, since he received it without such agreement, that it became his absolutely.

APPEAL FROM SCOTT COURT OF COMMON PLEAS.

January 10, 1880.

OPINION BY JUDGE COFER:

The evidence, if conceded to be competent, does not prove that the testator received the money arising from the sale of his wife's property, derived by her from Parker, under an agreement to invest it for her benefit, or that he received it under such an agree-

ment with any one, and having received it without such agreement it became his absolutely, and the appellee has no more right to it than if it had not come to her husband through her. This proposition needs no argument or authority for its support.

A single witness swears that he heard the testator say he had invested the money in the Lucas farm for his wife's benefit. Another says the testator always said he intended to invest it for her benefit, and a third that he had heard frequent conversations by the testator in regard to the disposition of the Frankfort property as to whether it was better for her to hold the property or to sell it and invest the proceeds in the Lucas farm, for which the testator was then negotiating, and that he had also heard the same question discussed after the purchase of the farm, and the testator said the money arising from the sales had been invested in that farm. This is all the evidence conducing to prove the alleged agreement, and we feel no hesitation in saying it is insufficient. But one witness ever heard the testator say he had invested the money for the wife's benefit. One heard him say he intended to do so, and another heard him say the money had been invested in the farm, but without any statement that it was invested for her benefit.

On the other hand we have the fact that the testator took the title to himself and held it in that way up to the time of his death, which was an act of bad faith towards his wife, if in fact he made the agreement alleged, and is amply sufficient to rebut any presumption of agreement arising from his statement that he had invested the money for his wife's benefit. We also have several circumstances conducing to show that Mrs. Sinclair knew how the title was held and failed to make any objection to it or to assert any claim that the land was hers.

Nor do we see any ground upon which the testator can be held to have received the money in trust for his wife independent of the alleged agreement with her. In the absence of such an agreement the presumption is that he received it as husband, and held and used it as his own.

Judgment *reversed* and cause remanded for further proceedings not inconsistent with this opinion.

W. S. Darnaby, J. F. Robinson, Finnell & Stevenson, for appellants. A. Duvall, Geo. V. Payne, Geo. E. Prewitt, for appellee.

KAVANAUGH ARMSTRONG v. FIRST NATIONAL BANK OF DANVILLE,
ET AL.**Real Estate—Innocent Purchaser.**

The question whether a vendee of real estate is an innocent purchaser within the equitable rule cannot arise between a vendor and vendee.

Covenants of Warranty.

A vendee of real estate has a right to rely on the covenants of warranty contained in his deed, and he is entitled to set them up and have his title assured before being required to pay the balance of purchase money.

APPEAL FROM LINCOLN CIRCUIT COURT.

January 10, 1880.

OPINION BY JUDGE COFER:

The appellant alleged in his answer that Dinwiddie, previous to the conveyance to him, sold and conveyed 66 acres of the land to Porter and wife, and that Dinwiddie at the time of conveying to appellant had no title to the land, and had not since acquired any. If this be true then it is clear that as to that part of the land appellant has not acquired title.

It is not material whether he knew at the time, or has learned since, that his vendor had no title. He had a right to rely upon the covenant of warranty, and especially so when, as alleged in the amended answer, he was assured that some arrangement had been made which avoided the deed to Porter and wife. He should have been allowed to bring them before the court and to have the title assured before being required to pay the balance of the purchase-money.

The authorities cited by counsel for the appellee to show that the appellant was not an innocent purchaser have no application to this case. In a contract between him and Porter and wife they would be in point. The question whether a vendee is an innocent purchaser within the equitable rule cannot arise between vendor and vendee.

The banks are mere assignors and not the holders of commercial paper, and the notes are subject in their hands to any defense that would have been good against their assignor.

Judgment *reversed* and cause remanded with directions to overrule the demurrers and for further proper proceedings.

Welsh, for appellant. J. S. & R. W. Hacks, for appellees.

JACOB BELL, ET AL., v. WAYNE COUNTY COURT.

Sheriff's Liability on Bond.

Where a sheriff executes a bond for the collection of public revenues and he assumes their collection, and his sureties undertake that he will comply with his obligation, even if the bond is defective and is not an official bond a common-law liability exists, and the sureties will be held liable.

APPEAL FROM WAYNE CIRCUIT COURT.

January 13, 1880.

OPINION BY JUDGE PRYOR:

The sheriff by virtue of his office is made collector of the county levy, and is required to execute a bond at the term of the court imposing the levy, or may execute it at a subsequent term. Chap. 27 General Statutes, p. 271.

The principal debtor in this case was elected in August, 1876, but failed to execute a bond in October when the levy was laid, and also failed to execute his official bond on or before the first Monday in January following, and for that reason his office was declared vacant. Whether the court had the right to appoint one sheriff to fill his own vacancy is a question not necessary to decide, as his liability and that of his sureties exist by reason of the execution of the bond and the collection of the levy.

It is rather a singular proceeding to forfeit or vacate the office and then appoint the person who has failed to comply with the law to fill the vacancy in the office he has forfeited. The levy was laid in October, 1876, and by the 6th section of Chap. 20, Art. 2, entitled "County Levy," it is provided that the clerk shall on or before the first of June following deliver to the sheriff or collector a list of the persons chargeable with the levy, and the sheriff shall proceed to collect, etc. Under that provision the clerk is not required, and certainly not compelled, to deliver this list until June following that assessment, and the sheriff must necessarily collect the levy in the year 1877. It is the indebtedness of the county ascertained in October, 1876, to pay which the levy is made, and the collection is or ought to be made in the year 1877. So when the bond is executed for the collection of the county levy and dues for the county of Wayne for the year 1877, it means the levy laid in 1876, and payable in 1877. No other levy is due in 1877, and therefore the covenants of

the bond in this case create a liability on the sureties of Carden for the levy collected by him in the year 1877.

The county judge had the right to accept the bond, and we find no provision of the statute requiring its approval by all the justices or a majority of them. The taking of this bond is a mere ministerial act, and it may be taken and approved by the presiding justice, who is empowered to hold the county court for all county purposes, and to have associated with him the justices of the peace in certain cases only, as provided by statute. The county court has the power to keep in repair the necessary public buildings, and certainly can raise funds by the imposition of a county levy. This jurisdiction must be conceded, and whether it was necessary that the levy should be imposed in this particular case or whether the levy has been excessive cannot be made the subject of inquiry by Carder and his sureties.

Was the levy made? Was it collected by Carder? Are these appellants his sureties in a bond that he will account for and pay the same over to the party entitled? If regarded in the light of a mere intruder neither he nor his sureties will be allowed to say that the principal had no right to collect the money.

The county court acted in good faith in accepting the bond. Carder voluntarily assumed the collection of the public dues, and his sureties undertook that he would comply with his obligation, and if not an official bond, a common-law liability exists, and the sureties were properly held responsible.

Judgment affirmed.

J. S. Chrisman, M. C. Sanfly, for appellants.

John W. Tuttle, for appellee.

COMMONWEALTH v. COVINGTON STREET R. CO.

Violation of City Ordinance.

Where the acts of persons holding a franchise and operating a railroad on a city street consist only in an omission to keep the street between its tracks in repair, they cannot be punished criminally, such acts not being in violation of a statute and not being a nuisance under the common law.

APPEAL FROM KENTON CRIMINAL COURT.

January 13, 1880.

OPINION BY JUDGE HARGIS:

The appellee, by section 3 of an ordinance of the city of Covington, entitled "Street Railroads," if we can take judicial notice of it, was authorized to lay its track along the streets of that city in such manner as to be no impediment to the ordinary travel and use of the streets, upon condition that bond should first be entered into with responsible sureties, "to keep the streets between the rails in as good repair as the balance of the street;" and for a failure to keep that portion of the street occupied by their track in good and sufficient repair" the city council should "have the right to prevent the use of said street or streets by removing the rails therefrom." The only penalty to which the appellant was subjected by the ordinance for a failure "to keep the street between the rails in as good repair as the balance of the street" is the loss of the use of the street and the removal of the rails by the city council, which has a right for a breach of the terms of the ordinance to inflict the penalty.

The criminal court had no jurisdiction to punish the alleged infraction of the ordinance, which does not embrace any act constituting a nuisance at the common law. The appellee was indicted for an omission in the exercise of its privilege to perform the acts required by the ordinance. The indictment does not charge that appellee obstructed or occupied the street exclusively, or has by any act of commission rendered the street dangerous or impassable, but it appears that it is generally free and open for ordinary purposes, subject to the inconvenience resulting from the alleged omission. The appellee is bound by no law, either common or statutory, to keep the street in repair. Therefore the indictment did not charge any offense which the court had authority either to try or punish.

Wherefore the judgment in arrest is *affirmed*.

Hardin, for appellant.

SAMUEL A. DAVIS *v.* ABNER DAVIS' ADM'R, ET AL.**Consideration of Contract.**

Where persons disagree and conflicting claims are asserted by each, and a suit is pending between them concerning the same, a contract between them providing for the settlement of such differences and the dismissal of the suit is based upon a good consideration, and such a contract is enforceable unless the same is abandoned or rescinded by consent of both.

One bringing suit on such settlement contract must aver fulfilment or a readiness to fulfil his part thereof.

APPEAL FROM UNION COURT OF COMMON PLEAS.

January 15, 1880.

OPINION BY JUDGE HINES:

The considerations for the agreement by which the suit of *A. Davis v. S. A. Davis* was to be settled, were valuable and meritorious. Numerous transactions and conflicting claims had been drawn into the action, and everything indicated a protracted and bitter litigation with a doubtful result. In this condition of affairs a solemn agreement was deliberately entered into, reduced to writing and signed by the parties. The first question to be considered is whether that agreement by contract or mutual understanding between the parties was set aside. The court below held that it had not been abandoned, and in this conclusion we are of the opinion that the court below is supported by the evidence.

The agreement was entered into on the 29th of May, 1872, and this action to enforce it was instituted on the 10th of September, 1873, by A. Davis, and the answer of S. A. Davis was filed on the 29th of October, 1873. In that answer it is contended that the money stipulated to be paid by A. Davis was to be paid immediately, and that as A. Davis had refused to comply with that portion of the agreement, and "therefore, this defendant considered the said agreement of compromise at an end, and so informed the plaintiff." To this answer a reply was filed December 2, 1873.

A. Davis died in 1875, pending the suit, and when the pleadings were in the condition indicated. The action was revived in the name of the administrator in July, 1876, the trial entered upon, and on the appellant making affidavit that the court's refusal to allow him to read his own deposition took him by surprise, and that he could prove by certain persons that A. Davis had said that he had abandoned the agreement, the cause was continued. In this affidavit of appellant for a continuance appears for the first time any intimation that the contract had been abandoned by both plaintiff and defendant, and the discovery that he could make this proof was made, as stated in the affidavit, between the 12th and 15th of July, 1876.

The proof, when made, does not support the statements in the affidavit. It is to the effect that A. Davis said that the agreement had been abandoned, and that his declarations to this effect had been communicated to appellant about the time they were made, that is,

about June or July, 1872, four years prior to the time appellant swears he heard of this evidence. The evidence of all the witnesses is in substance the same, and each one (with one exception) testifies that he was alone with A. Davis at the time he made the statements; but they do not testify that there was any agreement between the parties by which the agreement was abandoned; nor was any effort made to prove these facts prior to the death of A. Davis, notwithstanding the fact that they were known to appellant three years prior to the death of A. Davis. This fact, when taken in connection with the peculiar circumstances under which the witnesses heard the statements of A. Davis, is certainly entitled to great consideration.

That appellant himself did not consider the contract abandoned when these statements are said to have been made by A. Davis is perfectly manifest. On the 31st of August, 1872, appellant wrote to his father, A. Davis, as follows: "Pa, I would be glad for us to close up our settlement," and on the 29th of March, 1873, he again wrote as follows: "Pa, I received your note this morning and think it best that we meet Monday morning and settle all according to our agreement." It is true that appellant alleges that these notes referred to other business, and not to the compromise agreement, but the evidence fails to disclose the existence of any other matters between the parties. In September, 1872, appellant told Rowell that he had had a settlement and an agreement with A. Davis, by which A. Davis was to have the notes due from Rowell for the land, and that A. Davis was to pay him some money he had paid for him in the law-suit with Carman Rowell. This evidence is uncontradicted, and clearly shows that as late as September, 1872, appellant did not consider that the agreement had been abandoned.

Appellant does not allege an offer or willingness to comply at any time with his part of the agreement. The failure of A. Davis to pay the money or to offer to do so did not authorize appellant to treat the agreement as abandoned. It contained mutual and concurrent obligations and gave a right of action for failure to comply with its terms, but did not operate to release the other party. It was as much the duty of one as the other to tender a compliance with the agreement, and therefore appellant was as much in default by failure to surrender the land and notes as A. Davis for failure to pay the money.

There is no allegation or proof of any agreement to abandon

this contract, and having been entered into deliberately, understandingly, and for a valuable and meritorious consideration, it ought not to be disturbed and the gates of litigation re-opened upon such vague and loose statements as it is claimed that A. Davis made in reference to the matter, and especially when the development of this proof was delayed, without any good reason, until after the death of A. Davis. The agreement should have been enforced, and the judgment of the court below is in conformity to its terms.

Without entering into details as to the evidence of what appellant should have recovered of A. Davis on account of moneys expended in the law-suit, we deem it sufficient to say that in our judgment the ruling of the court in this particular is amply supported by the evidence.

Judgment affirmed.

Rodman, for appellant.

William Lindsay, Hoskins & Long, for appellee.

JANE RAYBURN, ET AL., v. WILLIAM NEWELL, ET AL.

Partnership Debts—Dissolution of Firm.

When after dissolution of a partnership a note is executed by one of the partners in the firm name to evidence a partnership debt, if the collection of the note is defeated because of a plea of non est factum being interposed, the creditor may sue on his account and recover such debt.

APPEAL FROM PULASKI CIRCUIT COURT.

January 15, 1880.

OPINION BY JUDGE PRYOR:

Newell and Jones were liable for the amount for which the note for \$278 was executed, as they were the surviving partners of the firm of Newell, Jones & Co. When this amount was included in the note given for a debt due by Newell & Jones to the appellant (another and different firm), it did not extinguish the debt, as Jones had no authority to make the last named firm responsible. The original liability was at no time extinguished or suspended, for the reason that as to the \$278 the notes were executed without authority. The institution and trial of the action on the \$710 note developed the fact that Jones had no power to bind the appellee on any obliga-

tion for the debt due Newell, Jones & Co., and for that reason Newell was released from the payment of the large note to that extent.

This left the debt due by the first named firm, Newell, Jones & Co., to the appellant, still existing, and as surviving partners Newell and Jones were liable for it. It is alleged that they both promised to pay the debt to the plaintiffs, and we think it would be a technical construction of the pleading to say that the allegation made in this record was not sufficient to show that the promise was made to the plaintiffs. The allegation that the defendants promised to pay plaintiffs is alleging, in substance, that the promise was to the plaintiff. It is immaterial whether the promise was made before or after the trial on the large note. Newell was not bound on the note for the \$278, nor was the firm of Newell & Jones, and therefore their promise, if made, must be considered without regard to the pendency of the action on the note for \$710. It was not necessary to make the record of that action a part of the petition. The parties having no right to give the note, the appellant, being defeated on the plea of non est factum, could resort to her action of assumpsit to recover the amount due for services rendered.

Suppose the entire note had been executed after the dissolution of the first named firm for a debt due by that firm, and the plea of non est factum had been interposed; while it would have defeated a recovery on the writing, the parties would have been remanded to their action on the original contract for work and labor performed and services rendered. The appellant was not required to amend by setting up an original cause of action, and the judgment cannot be pleaded in bar of the recovery if the facts alleged are proven.

Judgment *reversed* and cause remanded for further proceedings.

Curd & Waddle, for appellants. Morrow & Newell, for appellees.

NANCY FIELD *v.* S. B. FIELD'S ADM'R.

Husband and Wife and Husband's Creditors.

The savings of a wife may, with the consent of her husband, be applied to her separate use, and she may retain them as her own so far as regards her husband or his representatives after his death, but such claims of the wife cannot be enforced against the husband's creditors.

APPEAL FROM ADAIR CIRCUIT COURT.

January 16, 1880.

OPINION BY JUDGE COFER:

It seems to us that the case of *Basham v. Chamberlain*, 7 B. Mon. 443, is conclusive of this case.

The court there said that "the savings and profits made by the wife, the result of her industry and economy, may with the consent of her husband be applied to her separate use, which she will in equity have a right to retain exclusively as her own, so far as it regards her husband or his representatives after his death, where the rights of creditors do not intervene." But we know of no case in which it has been held that such an equity in the wife can be enforced against the husband's creditors.

It was admitted on trial that the husband's estate would be insufficient to pay his debts. At most the appellant has but an equity, and to enforce it to the prejudice of her husband's creditors, who have an equal equity and also a legal right, would be to put contracts between husband and wife upon an equality with contracts between the husband and third persons, and to remove at once all restrictions upon the power of contracting between husband and wife. This is, we think, forbidden alike by the law and a sound public policy. See *Maraman's Adm'r v. Maraman*, 4 Met. 84.

Judgment *affirmed*.

T. C. Winfry, A. Duvall, for appellant.

William Stewart, for appellee.

B. F. EVANS v. E. A. J. EVANS.

Guardian and Ward.

Where a note is executed by a minor under guardianship for money which he received, it is voidable at the option of said minor, but where he permits his guardian to pay such note and makes no move to disavow the note until more than a year after becoming of age, equity will not hold such guardian liable at the suit of such ward.

APPEAL FROM GARRARD CIRCUIT COURT.

January 16, 1880.

OPINION BY JUDGE PRYOR:

In the present case four years or more elapsed between the execution of the note to the appellant and the institution of this action. The note was of no validity or, rather, was voidable at the option

of the appellant to whom it had been executed in good faith by the guardian, all parties believing the disability of infancy on the part of the appellant had been removed by legislative enactment. No effort was made to annul the obligation by the appellant after his majority, nor notice given to appellees that he would not abide the note or attempt to avoid it by the plea of infancy. The guardian was left to pay the note, the legal effect of which he could not question, when if notified by the appellant he might have withheld payment. An equitable defense might have been made by the appellee to this note if notice had been given by appellant that he would not abide the settlement or the manner in which his claim against the appellee as guardian had been satisfied. It seems, however, that the parties were not aware for a year or more after the settlement that the governor had vetoed the act removing the disability of infancy. The appellant was then of age, and still no notice was given to the guardian, but the latter was left to pay the note when he might have protected himself against any effort to coerce it. It does not appear when the guardian paid the money, but it is evident that it was *not* paid by him to Sweeney, but passed to some one else, and afterward paid.

Under the proof in this case, and after the lapse of several years, the chancellor will not indulge in a presumption favorable to the appellant with a view of making a faithful guardian responsible. The appellant knew the mistake under which all the parties were laboring at the time of the settlement. He knew that the appellee had executed his note to him, and that he had disposed of it to others and squandered the proceeds. He should have given appellee some notice that he might have protected himself from making double payment of the same debt, and, failing to do so, must abide the consequences. Whether the guardian had the right to rely on the representation of the appellant as to the legislative enactment is not necessary to be determined. It is certain that a mistake was made if no fraud was practiced, and the appellant, knowing the mistake, abided it for years after his arrival at age, and, having in fact received the money, the equity of the case is so strong in the favor of the appellee that a chancellor would hesitate a long time before making the latter responsible.

Judgment affirmed.

Burdett & Hopper, for appellant.

Denny & Tomlinson, for appellee.

S. A. SMITH v. HUGH RYAN, ET AL.

Evidence—Receipt of Wife.

A paper purporting to be a receipt of the wife is not admissible in evidence in the absence of evidence to show that she was authorized by her husband to receive the money, or that if received by her it was with his knowledge and consent.

APPEAL FROM JEFFERSON COURT OF COMMON PLEAS.

January 16, 1880.

OPINION BY JUDGE HINES:

We are of the opinion that the court did not err in refusing to allow the paper purporting to be a receipt by Mrs. Ryan to be read to the jury. There is nothing in the case to show that she was authorized by her husband to receive the money, or that if received it was with his knowledge and consent. The only fact looking in that direction is the suggestion made to Mrs. Ryan by her husband that she ought to settle with Smith. If there was no authority, as we think appears, to sign such a paper, the affidavit of Ryan and wife was clearly incompetent, or at least immaterial, as in the absence of the authority to sign the receipt it is useless to inquire into the genuineness of the signature to it.

There appears to be no error in giving or refusing instructions.

Judgment *affirmed*.

Russell & Helm, for appellant. Kahn & Baker, for appellees.

JOHN H. CHINN, ET AL., v. O. B. GOULD, ET AL.**Rights by Dedication.**

Where property is dedicated for a certain purpose and is accepted by those to whom made, and they have held adverse possession thereof for many years and are then dispossessed under a writ issued in a cause to which they were not parties, such parties, or some of them for themselves and others entitled thereto, have a right to maintain an action to secure such rights and preserve the dedicated property for the benefit of themselves and all others entitled under the terms of the dedication to participate in its use.

APPEAL FROM GREENUP CIRCUIT COURT.

January 17, 1880.

OPINION BY JUDGE COFER:

Counsel for the appellee does not seem to question the validity of a parol dedication in a case like this and moreover it is distinctly and clearly alleged that those to whom the dedication was made have been in the actual adverse possession of the property for a period of more than fifteen years, and that they were dispossessed under a writ issued in a cause to which they were not parties. These facts constitute a clear right to restitution, unless, as claimed, the appellants had no legal right to sue, or the societies to which the dedication was made cannot be ascertained from the terms of the dedication as set forth in the petition.

The appellants attempt to sue in a double capacity, first, that they are the representatives of all the beneficiaries, and second, that they are themselves beneficiaries, and members of societies which are entitled to use the property, and as such have a right to maintain the action in order to preserve the property for the benefit of themselves, and of all others entitled under the terms of the dedication to participate in its use. We think they have a right to sue in either capacity.

The dedication was to charitable uses. The beneficiaries are the various Christian religious denominations and the public. These have no common organism; none of them appear to be incorporated. Under such circumstances they cannot maintain an action in the name of any one or all of the organizations, and must be permitted to sue by representation, or the charity must fail. Under such circumstances the chancellor will not permit the beneficent purpose of the donor to be defeated upon objections to mere form when he can see that the persons suing on behalf of the beneficiaries are doing so with the consent of those they undertake to represent.

Moreover, the appellants are interested as individuals, and may be permitted to sue for themselves and all others interested with them, and the court should have permitted them to do so.

Judgment *reversed* and cause remanded with directions to overrule the demurrers.

T. H. Paynter, E. C. Phister, for appellants.

E. F. Dulin, for appellees.

LEE, ET AL., v. WATSON, ET AL.

Garnishee Proceedings.

Where one is served with notice as a garnishee defendant and admits that he is indebted to the principal defendant, but plaintiff believes that he has not disclosed the full amount of such indebtedness, an issue thereon may be formed as between the plaintiff and such garnishee defendant, and such matter may be fully litigated or such plaintiff may file an original petition as against him and have the matter fully determined.

APPEAL FROM MARION COURT OF COMMON PLEAS.

January 17, 1880.

OPINION BY JUDGE PRYOR:

The pleadings are so confused in this case that it is difficult to learn the real issue on this appeal. The question, and the only one we propose to consider, is the right of the appellants to show, upon proper allegations by an amended pleading, that the garnishee has failed to disclose the real amount of his indebtedness.

Rodimer had been garnisheed by Bailey & Watson to secure a debt owing them by Mike Lee. Rodimer came into court and admitted an indebtedness. These appellants by petition were made parties, and they claim that the amount owing by Rodimer had been transferred to them, and by an amended cross-petition allege that Rodimer had failed to make a full disclosure of his indebtedness for the corn, but was owing a larger sum for corn sold and delivered by the debtor to him at his request, etc. They were permitted to be made parties and exhibited a claim to this particular fund. The indebtedness by Rodimer to Lee originated from a single transaction; and by an express provision of the Code an attaching creditor may, by an original or amended pleading, proceed against the garnishee by petition when the latter fails to make disclosure. These appellants were before the chancellor asserting their right to the whole fund, and said to the garnishee, "You owe more than you admit," and then set forth the consideration.

The garnishee is out of court in so far as he is required to plead when he files his answer denying or admitting, if a mere garnishee; and the only way you can get him into court is by an amended pleading in the same action or an original petition attacking the truth of the statements made by him and setting forth a cause of action by the debtor. These appellants were compelled to come into court to

litigate their right to the money, and it being a single transaction we see no reason why they should not be allowed to say that the debt was for more than is admitted and require the garnishee by a proper pleading to respond as to the claim. The chancellor ought not to sever the claim, and by rendering a judgment for a part of it in one action require the party entitled to bring his separate action for the remainder. But it is alleged that the amount claimed against the garnishee exceeding the sum admitted by him is under fifty dollars, and therefore there is no jurisdiction to revise. The claim is a unit, and the whole of it in controversy. It is as if an original action had been brought, and the party admitted an indebtedness of all but \$47. The amount claimed in the petition must govern. We see no reason, particularly in a court of chancery, for saying that parties who are compelled to litigate about one transaction in order to have their rights determined shall have a part of the relief in one court, but in order to obtain complete relief must seek another forum, that they can take judgment for a part of the note, but as to the balance must sue at law. It prevents multiplicity of actions by putting an end to litigation when all the parties are before the court and required to assert their rights.

To determine otherwise, the plaintiff in the attachment and the plaintiff in the cross-petition have a cause of action for one part of the debt in this proceeding, and another for the balance due in an independent action, and perhaps in the same forum. When each party is asserting a right to the entire claim, and the one or the other is entitled to it, they should be allowed to litigate their right, and a judgment be rendered in favor of the party entitled. The question as to damages by reason of the garnishee will be settled should the appellants recover by a judgment for the debt, interest and their costs; this is all they can recover.

Judgment *reversed* and cause remanded.

Russell & Arritt, for appellants. John McChord, for appellees.

JOHN R. HOBBLER *v.* PLEASANT McDOWELL.

Guardian and Ward.

Courts of equity will not permit a guardian to contract with his ward; nor will such agreements be enforced if made within a short time after the ward becomes of legal age, except where the utmost good faith has been shown, for the reason that the influence of the guardian over the ward is still presumed to exist.

APPEAL FROM LARUE CIRCUIT COURT.

January 20, 1880.

OPINION BY JUDGE PRYOR:

The agreed facts conduce to show that the appellant, when he surrendered the property to which he was entitled in right of his wife, was laboring under the belief that the execution of the will divested him of all interest except as a devisee, and that the only remedy left him was to make a distribution in accordance with its provisions. He was told that it was his property unless he consented to the wishes of the wife, but at no time was informed that he had the power to revoke the will or prevent its probate, and when making the settlement was in ignorance of his legal rights.

The peculiar circumstances surrounding the appellant at the date of the execution of the will of his wife must necessarily impress the mind of the chancellor with the belief that the husband was in no condition to resist the request of the wife, or to advise with her, in the presence of those who were to be the devisees, as to the disposition he thought should be made of her estate. Both the young man and his wife should be regarded as being under the control of her uncle who had been her guardian, and who was present when the paper was executed by which his wife was made one of the principal devisees. The wife was scarcely eighteen years of age, and the appellant only twenty-one years and two months old, when this transaction took place. It was entered into in the presence of the guardian of the wife, and for his benefit without any consideration passing to the appellant, and when both, by reason of their youth and want of experience in business affairs, must have been subordinate to his will.

The guardian was not able to surrender his trust, or rather the trust property, by reason of the non-age of the husband; and after the latter arrived at age and within two months from that period, he settled his indebtedness to his ward or her husband by claiming the property as a gift from the ward by the consent of the appellant. Courts of equity will never permit a guardian to contract with his ward, nor will such agreements be enforced if made within a short time after the disability of infancy has been removed, except where the utmost good faith has been shown, for the reason that the influence of the guardian over the ward is still presumed to exist.

Here the money had never been paid by the guardian, but was

held by him for his infant ward and her husband, both infants, and within two months after appellant had arrived at age, two-thirds of the estate had passed from him to the guardian and others without any consideration. The trust fund had never left the hands of the guardian, and the agreed facts have not convinced this court that the consent of the appellant to the making of the will was his spontaneous act, or that he made the settlement with a full knowledge of his legal rights. This case should be considered in the same manner that the settlement would have been, if made with the ward as soon as she arrived at age. In either case a surrender of one-third of the estate to the guardian or his wife, with no other moral obligation than the blood relation existing between them or the kindness of the aunt to the deceased wife during her illness, must be presumed to have arisen from the influence of those who have had their care and protection, and whose command they had been taught to obey.

We do not regard the parties as guilty of any fraudulent conduct in obtaining the money of appellant, but to sanction such a settlement would be to establish a precedent that would lead to the exercise of undue and improper influences by guardians and other fiduciaries for purposes of gain over those whose rights they should maintain.

As to the amount paid to the sister of appellant's wife, it must be regarded as voluntary, at least it was not paid at the instance of the guardian; but as to the sum received by McDowell, either in his own right or for his wife, he must refund with interest from the date he received it.

Judgment *reversed* and cause remanded for further proceedings.
William Lindsay, T. A. Robertson, W. H. Chelf, for appellant.
Reid & Twyman, for appellee.

PADUCAH & E. R. CO. v. CHARLES GLASSCOCK, ET AL.

Bill of Lading for Stock Shipped.

Where a railroad company gives a through bill of lading to Louisville to a shipper of live stock and does not operate a line of railroad to such destination, and by reason of delay in sending the stock forward on a line connecting its terminus with the point of destination the stock is damaged, the shipper may recover from the road issuing such bill.

APPEAL FROM HARDIN CIRCUIT COURT.

January 20, 1880.

OPINION BY JUDGE COFER:

The appellant gave a through bill of lading to Louisville, and is responsible for any delay at Elizabethtown occasioned by the failure or refusal of the Louisville & Nashville R. Co. to send the cattle forward without any unnecessary delay. It was appellant's business to see to it that the stock went forward within a reasonable time, and it cannot excuse itself by showing that the Louisville & Nashville R. Co. had changed the time of the arrival of one of its trains, any more than if the train had been under the control of appellant, and the time had been so changed that the delay had been occasioned by its own act,—for, having contracted to deliver the stock in Louisville, if it procured another company to perform a part of its obligation under the contract it became responsible for the default of the company so employed.

No one would question the liability of the appellant for the injury resulting to the cattle if it had owned and controlled the trains on the Nashville road, or had owned and operated a road to Louisville, and in consequence of the ignorance of its agents as to the time when trains would run through, the stock had been detained for so long a time on the road and had in consequence been damaged. That is substantially this case. Counsel seem to treat the contract as if the appellant had merely undertaken to forward the stock to the terminus of its own road and there to deliver it to the connecting lines to be forwarded for the shipper. But as already remarked such was not the contract.

On the contrary the appellant undertook for itself to deliver the stock at its destination. The evidence showed without contradiction that the delay was occasioned by the change in the time of the running of a train on the Nashville road, and the court might well have decided as matter of law that the appellant was guilty of negligence in not knowing when the stock could be forwarded, and the instructions were therefore more favorable to it than the law entitled it to. If the contract had been merely to carry to Elizabethtown and there deliver to the Louisville & Nashville R. Co., the question would have been wholly a different one, and there might be some room to doubt the correctness of the instructions.

In the view we have taken of the law of the case, the only ques-

tions that could possibly have been proper for the consideration of the jury were, (1) was the delay unreasonable under the circumstances; (2) were the cattle injured by the delay; and (3) what was the amount of the injury sustained? These questions were fairly presented by the instructions and the finding was authorized by the evidence.

There was no demurrer to the petition, and it seems to us to be sufficient, especially after verdict, and there was no error in overruling the motion in arrest of judgment. Judgment *affirmed*.

Lyttleton Cooke, William Wilson, for appellant.

James Montgomery, for appellees.

GREENUP KING, ET AL., v. MALARINA HOWLETT, ET AL.

Wills—Demise to Wife and Her Children.

Where by a will a testator gives to his wife a life estate in property and the fee simple to her children, such a demise includes all children born and to be born.

APPEAL FROM HARDIN CIRCUIT COURT.

January 20, 1880.

OPINION BY JUDGE PRYOR:

At the death of Hiram Withers he left three children, one dying in infancy, and the other two surviving until they arrived at age. He left a will by which he devised his estate to his wife for life or widowhood and then to his children, with the request to the wife that if she could spare such child's portion as they arrived at age to let them have it. It was discretionary with his widow whether she would make a distribution during her life, as under the plain provisions of the will it belonged to her until her death. James Withers, one of the children, died and left a will by which he gave his estate to his mother during her life and then to his sister Hannah and her children.

His sister was then a widow with children, and has since married King, by whom she has had children. The devise was to the children of Mrs. King then born and to be born, and not restricted to those living at the date of the will or when publication was made. There is no ambiguity in the will in reference to this question, and there was no intention on the part of the deviser to exclude any of

his sister's children. A life estate had been created in the deviser's mother, and the enjoyment of the estate postponed by the remaindermen until the mother's death. There was no reason to exclude any of the children of Mrs. King, nor any such purpose manifested by the provisions of the will. A devise by the testator to his wife and children includes all born and to be born. Mrs. King and her children are now the owners of the entire land, and in making the division when the husband has made lasting and valuable improvements in the way of buildings out of his own pocket that part should be allotted to his wife and children by her, unless the improvements consist of mere repairs, etc. The improvements, if permanent and lasting, should not be valued as against them.

Judgment *reversed* and cause remanded for further proceedings.

Wilson & Hobson, for appellants. R. L. Stith, for appellees.

SAMUEL FAUCETT v. HEARN, LEE & PINKARD, ET AL.

Homestead Exemption.

Where one sells his house and lot on time payments and purchases another house and lot and pays for it by transferring a stock of dry goods, but bought it after becoming indebted, the transaction is not an exchange of one exempt piece of property for another so as to cause the exemption in the first to attach to the last. The sale of the first property operated to destroy the homestead, and exemption did not attach to the dwelling afterward purchased.

APPEAL FROM FLEMING CIRCUIT COURT.

January 20, 1880.

OPINION BY JUDGE HINES:

The only question we need to consider is whether the court erred in refusing to allot appellant a homestead.

About the 1st of February, 1874, appellant owned a house and lot and occupied it with his family. Prior to the 12th of February, 1874, he sold the house and lot on time and purchased the house and lot in which the homestead is claimed, and paid therefor in a stock of dry goods. The last purchase was made subsequent to the creation of the debts to appellees, and was not in any sense such an exchange of one exempt piece of property for another as would cause the exemption in the first to attach to the last. The absolute sale of the first piece of property operated to destroy the homestead, and ex-

emption did not follow the purchase-price or attach to the dwelling subsequently purchased.

We perceive nothing in the other assignment of errors that requires a response.

Judgment affirmed.

W. H. Cord, for appellant.

W. S. Botts, Thomas Givens, for appellees.

WILLIS FIELDS' ADM'RS *v.* JOHNSON MILLER.

Recovery of Usury.

Where one pays usury it is presumed he knows the law, and he cannot recover it where barred by the lapse of time by averring his ignorance as to what constitutes usury.

APPEAL FROM WOODFORD CIRCUIT COURT.

January 20, 1880.

OPINION BY JUDGE PRYOR:

The appellee knew when he received the money from the appellants that they were paying him usurious interest, and it must be presumed that appellants had the same knowledge. It is presumed that they were informed in regard to the law, and an allegation by parties of their ignorance as to what constitutes usury can afford no ground for relief.

When the money was paid they had the right to recover it back, and if barred by the lapse of time the right of recovery cannot be affected by a mere change in the remedy. It is at least an action to recover money, and when asked why it was not sooner instituted a response that the party supposed he was bound by the letter of the obligation and was under the belief that it was not usury cannot be entertained.

It was voluntary ignorance on the part of the appellants, as the means of information as to the nature of the transaction was within his reach, and he should have informed himself as to his legal rights.

Judgment affirmed.

H. C. McLeod, for appellants. Porter & Wallace, for appellee.

JOHN ALLEN v. JOHN WILCOX.

Damages for Property Taken.

The statute which declares that a writ of ad quod damnum shall be awarded "if desired by the proprietor, or if the court see cause for awarding the writ," means that where any legal cause exists for ordering the writ it is the duty of the court to award it.

Assessment of Damages.

Where a person's property is being taken from him without his consent, to be used as a highway, he is not bound to refuse to accept a sum for his property, upon pain of his silence being taken for his willingness that the court should act on a subject about which it could not act except by his consent. Under such circumstances he is entitled to have his damages fixed by jury.

APPEAL FROM BOYD CIRCUIT COURT.

January 20, 1880.

OPINION BY JUDGE HARGIS:

The 8th section of Art. 1, Chap. 94, Gen. Stat. is imperative. It declares that a writ of ad quod damnum shall be awarded "if desired by the proprietor, or if the court see cause for awarding the writ."

"If the court see cause for awarding the writ" is equivalent to declaring that where any legal cause exists for ordering the writ it becomes the duty of the court to award it unless the state of case, contemplated by Section 6 of the same article, exists to authorize the court, without a writ of ad quod damnum, to assess the amount of damages. By that section the court has no right or power to assess the damages unless the proprietor is "willing to accept what the court deems just."

The appellant declined to accept or reject the amount the court deemed just in the case. Because he thus refused to consent or signify his willingness to accept the amount fixed by the court, or that the court might assess the damages, it assumed the power to do so without a writ of ad quod damnum. Where a citizen's property is being taken from him without his consent, as in this case, for the appellant resisted the whole proceeding to establish a road, he is not bound to refuse to accept a sum for his property even when it is taken for public use, upon pain of his silence being taken for his willingness to the action of the court over a subject about which it had no authority to act except by his consent. The term "willing" is used in Section 6 as synonymous with "consent."

Under a somewhat similar statute this court said in the case of *McCauley v. Dunlap*, 4 B. Mon. 57, that it was the duty of the court "to order such proceedings to be had by jury, as in cases of public roads, on the single fact that the party objects to the establishment of the passway." While that case does not directly decide the proposition in dispute in this, it gives, by analogy, a proper rule of construction to be applied to sections 6 and 8, *supra*, which sections must be construed together.

We do not perceive any other error in the proceedings by the county court. Wherefore the judgment is *reversed* with directions to the circuit court to reverse the judgment of the county court and direct it to issue a writ of *ad quod damnum* and for further proceedings.

L. T. Moore, G. N. Brown, for appellant.

K. F. Pritchard, for appellee.

PETER SMITH, ET AL., v. TRUSTEES OF ASHLAND, ET AL.

Annexation of Lands by Towns.

Whether lands are agricultural and should not be subject to taxation for city purposes depends upon the circumstances of each case, and the discretion of a town in extending its boundary and the levy of taxes within such limits for municipal purposes will not be interfered with by the courts unless it is clear that the burden of taxation is imposed without any view to the interest of the owner, but merely to increase the town's revenues.

APPEAL FROM BOYD CIRCUIT COURT.

January 20, 1880.

OPINION BY JUDGE HINES:

The exercise of legislative discretion in extending the boundary of towns and the levy of taxes within such limits for municipal purposes ought not to be interfered with by the courts unless it is manifest that the burden of taxation is imposed without any view to the interest of the owner of the land and merely to increase the revenue of the town. The extension of the boundary of the town in this case appears to have conferred upon the appellants all the privileges of any other citizen of the town. It is not material to enquire whether they enjoyed these benefits before the limits were extended. If they did, it was eminently proper that they should be brought

within the taxable district and made to bear their portion of the municipal burdens. In every instance, whether lands are agricultural in the sense that they should not be subject to taxation for municipal purposes depends upon the peculiar circumstances of the case. No arbitrary rule can be laid down by which to determine how much land should be contained in one body in order to classify it under the head of agricultural lands. A rule applicable and appropriate to lands lying contiguous to Louisville or New York would not be the rule that the court could apply to lands adjacent to the town of Ashland.

On a careful consideration of this case we cannot see that the court below has erred. An exemption from taxation in this instance would authorize, by the application of the same rule, the exemption of the greater part of the land lying within the town limits.

That the judgment for cost is in favor of N. E. Fisher, committee of Peter Smith, cannot affect appellants. Fisher is not a party to this record, is not complaining, and has no right to complain.

Judgment *affirmed*.

D. K. Weis, for appellants. John T. Hayes, for appellees.

LEWIS SUBLETT'S EX'R v. JAMES W. BROOKIE, ET AL.

Administrator's Liability.

An administrator will be held personally liable if he sells the goods of his intestate and accepts security which would not have been accepted by a man of ordinary prudence.

Liability of an Estate on Contract.

Before an estate can be held liable on a new contract by a personal representative about a new matter with which the decedent had no connection, it must clearly appear that the estate has been benefited by it.

APPEAL FROM ANDERSON CIRCUIT COURT.

January 20, 1880.

OPINION BY JUDGE COFER:

We are of the opinion that the judgment must be affirmed, if for no other reason because the allegations in the petition do not show that the contract sued upon was in any way beneficial to the estate of Armistead Miller, and because the administrators are not otherwise liable.

Notwithstanding the fact that it appears from the petition that the whole amount of the debt was collected by the sheriff, it may still have been true that if it had not been collected the administrators would have been liable on their bond for the loss of any part of the debt. It appears that within less than six months after the judgment was recovered Bond & Co. became insolvent, and went into bankruptcy without any assets, and that Grandison Smith, their surety, if not insolvent when the judgment was rendered against him in favor of Miller and Sublett, became so immediately afterward. In view of the facts appearing in the petition it is far from certain that the administrators could not have been made personally liable for any part of the note they assigned to Johnson Miller which might not have been collected.

An administrator will be personally liable if he sells the goods of his intestate and accepts a security for the price which would not have been accepted by a man of ordinary prudence, although those who become bound may have enough property subject to execution to pay the debt. The burden was on the appellant to show that the estate was benefited by the contract made with the administrators. His learned counsel does not dispute this. It was therefore incumbent upon him to show that the estate was not already secured by the responsibility of the administrators on their official bond.

If the debt had been lost and they had been sued for a devastavit, they would have been *prima facie* liable, and could only have escaped liability by showing that Bond & Co. and Smith, when the note was accepted, were possessed of such means and credit that a man of common prudence would have accepted their paper for such a sum of money, and the same facts are necessary to show that the estate was benefited by the contract sued upon. Aside from this, judgment had already been entered on the note, and it does not, and from the very nature of the case cannot, appear that it could have been set aside, or that a motion for that purpose would have been made.

It is alleged that the defense pleaded to the suit of Miller and Sublett applied alone to the other case, and was filed in the former by mistake of Bond & Co. and their counsel; but it is recited in the written contract that it had been pleaded in the former case, "and might with equal truth and propriety be used as a defense" to the latter. This recital must control the allegation in the petition. It thus appears that the defense might have been relied upon in either case. It is therefore impossible to say that Bond & Co. would have

withdrawn their defense if Sublett or Miller and Sublett had asked them to do so. Nor can it be shown that if it had been done the judgment in favor of Johnson Miller could have been set aside.

The best that can be said for the appellant is that there is a remote possibility that but for the agreement sued upon the estate would have sustained loss, all we can do is to speculate as to what might have happened, and the law does not authorize personal representatives or courts to subject the estates of deceased persons to liability upon a balancing of possibilities or even of probabilities. Before an estate can be made liable on a new contract by a personal representative about a matter with which the decedent had no connection whatever it ought clearly to appear that the estate has been benefited by it. When such is the case courts of equity may be authorized upon principles of natural justice to enforce the contract to the extent that the estate has been benefited, and in such cases we see no good reason why it may not be done in a direct action against the personal representative as such, although he may be personally liable on the contract.

Nor is the appellant entitled to recover against the administrators personally. They expressly covenant in their fiduciary capacity, thereby excluding the idea of individual liability. Upon this point *Lusk v. Anderson's Adm'r*, 1 Met. 426, seems to be an authority in point. The court said a judgment in personam against the administrator would have been erroneous, "because the petition showed that he executed the obligation sued on in his fiduciary capacity, and not as an individual. It showed that there was no intention upon the part of Hopper (the administrator), in executing the obligation, to bind himself personally nor his estate."

That there was no prayer for a personal judgment is adverted to, not, as we think, as the principal ground of the decision, but as an additional argument to prove that the parties understood and intended the obligation to be that of the fiduciary, and not of the individual.

The language of the covenant here is that Miller and Portwood "bind and obligate themselves in their fiduciary capacity," and they sign as administrators, thus evincing by the express language of the covenant and the manner of executing it that they only intended

to bind themselves as administrators, and did not intend to become personally liable.

Wherefore the judgment is *affirmed*.

D. L. Thornton, J. B. Houston, for appellant.

Porter & Wallace, for appellees.

W. P. McCLAIN *v.* LUTHER MATTHEWS, ET AL.

Administrator's Sale of Real Estate.

Where an administrator petitions to settle the estate and for an order to sell lands to pay debts, and a commissioner makes a sale for much less price than such land might bring at another time if the sale is fairly made, is not a sufficient ground for setting aside the sale. In order to authorize a sale to be set aside for inadequacy of price it must be so great as to import fraud.

APPEAL FROM HENDERSON COURT OF COMMON PLEAS.

January 21, 1880.

OPINION BY JUDGE HINES:

The administrators of J. H. Matthews instituted a suit against his heirs and creditors to settle the estate, alleging insufficiency of personal assets and asking the sale of a certain piece of land to pay debts. The infant defendants were properly before the court and represented by guardian ad litem, who answered, but it appears that the attorney appointed for them as non-residents did not report.

To this petition William McClain answered, setting up the fact that he held a lien for purchase-money on the land sought to be sold, making his answer a cross-petition against the infant heirs and asking that his lien be enforced. On this cross-petition there was no service of process.

On reference to a commissioner and a confirmation of his report showing insufficiency of personal assets, the land was sold and purchased by William McClain for the amount of his debt as reported by the commissioner, and conveyed, by direction of the purchaser, to appellant, to whom a writ of possession was granted April 11, 1877, and possession delivered.

Some eight months after the writ of possession was awarded the non-resident defendants filed their petition, and a year thereafter

filed exceptions to the confirmation of sale. The objections urged were:

First: That the bond required before the sale of land belonging to parties constructively summoned had not been given.

Second: That the judgment was for too much money.

Third: That the attorney for the non-residents had not reported.

Fourth: That the administrators had in their hands enough to pay McClain's debt.

Fifth: That appellees had been misled by the administrators.

Sixth: That the land was sold for one-third of its value.

Seventh: That one of the defendants died after judgment and no revivor was had.

There is no suggestion of fraud or improper conduct on the part of McClain. The court below sustained an exception and set aside the sale. From that judgment this appeal is taken. The petition sets up none of the causes for vacating a judgment after the expiration of the term at which it was rendered as provided in Secs. 518 and 344 of the Code, and it is equally clear that appellees have not brought themselves within Sec. 414 of the Code.

Appellant tenders no defense to the action. He does not dispute the debt, nor does he charge or prove fraud or improper conduct. *Dawson v. Litsey*, 10 Bush 408. Sec. 440, Myers' Code, did not require the execution of a bond before judgment when the action was, as in this instance, for the settlement of the estate and for the sale of real estate to pay debts. The record fails to show that the judgment was for too much money. The failure of the attorney for the non-resident to report is not a reversible error. *Brown v. Early*, 2 Duv. 369.

It does not appear from the record that the administrator had in his hands sufficient assets to pay the debt, and if he did have it would not authorize a reversal. The lienholder had a right to proceed to enforce his lien with reference to the amount of assets, and without the existence of the lien such a sale would vest the purchaser with good title.

There appears to have been no necessity for a revivor on the death of one of the heirs. She died in infancy, and the other heirs who were before the court took the whole of her interest.

That the land sold for much less on the sale by commissioner than it would sell for at another time is not clearly shown, nor is it material, as the first sale was fair, there being nothing to show that it

could then have been sold for more money. The only evidence that it could now be sold for more are the affidavits of two persons who appear to have lands adjoining. In order to authorize a sale to be set aside for inadequacy of price it must be so great as to import fraud. *Stump v. Martin*, 9 Bush 285.

There was no necessity of making the answer of McClain a cross-petition against the infant heirs, or, after he did make them parties, that there should be process on guardian ad litem. The heirs were all before the court on the original petition, and there was no more reason why McClain should bring an original action against the heirs than there was for any other creditor doing so.

The objections made by appellees would not have authorized the court below to set aside the sale, even if exceptions had been filed and the case opened at the term at which the original judgment was rendered.

Wherefore the judgment is *reversed* and cause remanded.

M. Yeoman, William Lindsay, W. P. McClain, for appellant.

M. Merritt, for appellees.

HENRY RUSSELL v. J. B. RUSSELL'S ASSIGNEES.

Homestead Right Descends to Heirs.

Upon the death of the owner and holder a homestead descends to his heirs, but this interest may be sold when necessary to pay debts. The proceeds of the sale of a homestead constitute a part of the estate.

Right of Creditors.

Creditors may cause the homestead to be sold subject to the right of occupancy by the children until the youngest unmarried becomes twenty-one years old.

APPEAL FROM NELSON CIRCUIT COURT.

January 22, 1880.

OPINION BY JUDGE COFER:

It is conceded that J. B. Russell retained his homestead, and it follows that the title to the homestead remained in him just as if the deed of assignment had not been made. *Wing v. Hayden*, 10 Bush 276. As to the homestead he had an absolute estate in fee, and might have sold it and invested the purchaser with a perfect title. When he died the title to the homestead descended to his heirs at

law. Under Sec. 14 of the homestead law the remaining interest in the homestead may be sold, when necessary to pay debts, but his death did not enlarge the estate of the assignees. It follows that the proceeds of the sale of the homestead do not belong to the assignees, but constitute a part of the general estate of Russell and, after deducting the amount paid to the guardian of the infants, should be applied as if no assignment had been made.

The infants had no estate in the land derived through the homestead law; all it gave them was a right of occupancy. But their ancestor had the fee, and at his death it descended to them. The creditors had a right, under Sec. 14, to sell the homestead subject to the right of occupancy by the children until the youngest unmarried attained the age of twenty-one years.

After deducting from \$1,000 the amount paid for the interest of the infants under the homestead law the balance is subject to the payment of the debts of the decedent, just as if that balance constituted his whole estate, and as the appellant's is a claim preferred by statute the court erred in not directing it to be paid.

Judgment *reversed* and cause remanded for a judgment in conformity to this opinion.

John A. Fulton, for appellant.

Muir & Wickliffe, for appellees.

JOHN M. REID v. COOK & GREEN'S TRUSTEE.

Partnerships—Lien on Property Sold.

Where a partnership sold all its property, both real and personal, and retained no lien for the purchase-money, but the partnership purchasing such property fully paid for it and held possession for five years or more, the creditors of the vendors cannot reach said property, but it is subject to the claims of creditors of the vendees whose debts were created long after their debtors took possession of said property.

APPEAL FROM LINCOLN CIRCUIT COURT.

January 22, 1880.

OPINION BY JUDGE PRYOR:

It is evident from the proof in this case that Green, Hocker & Co. sold all their partnership property to the firm of Cook & Green, and that the sale was made in the best of faith. The transaction took

place in the year 1872, and the firm of Green & Cook have been in the possession by themselves and tenants or assignees since that date. It also appears that the last named firm has paid all its indebtedness to Green, Hocker & Co., and no lien exists in any way by the latter on any part of the property. Under the agreement, if made, to pay the debts of the old firm, their liability would not be greater than the amount they consented to pay. The lien, or rather claim, of the partnership creditor on the partnership property is purely derivative, and when the partnership property is sold the lien of the creditor is gone. From the exhibit made it appears that no indebtedness exists, and, this real estate constituting a part of the partnership property, the failure to execute a deed or bond cannot affect the rights of the purchaser. It is not pretended that the creditor was without notice as to the change in the firm, and their possession from 1872 until 1877, a period of five years and more, under this parol purchase, gave them a perfect title.

This is a contest between the creditors of the last firm and those of the first. That a sale was made is not questioned, and no lien retained for the purchase-money. How can the agreement between these parties affect the rights of those who have credited this last firm, without notice of the lien, and when in fact none exists? The partners had the right to sell, and the sale, when made, passed to the purchaser a perfect title. The property bought became assets of the new firm, and the amount owing by the vendees assets of the old firm. If Green & Cook are indebted to the old firm the appellant can subject this amount to the payment of his debt, but as to the partnership property of the last firm no lien exists upon it, although the whole of it may have been purchased of another firm and the debt unpaid, or the agreement to pay the debts of the old firm violated.

We know of no law giving partners a lien on the sale of their property when if made by a single vendor no lien would exist. Here was a sale and delivery of all the property, the real estate constituting a part of the partnership effects, having been purchased and sold for partnership purposes, no lien of record, and it is now maintained that the party selling has a lien as against the creditors of the vendee or the last firm. A lien, to be effectual in such cases, must be of record, and without it the rights of third parties cannot be effected, nor would the law imply a lien against the vendee.

The personal judgment has not been disturbed or affected by the dismissal of the petition and discharge of the attachment.

Judgment below *affirmed*.

Varnon & Welsh, A. Duvall, for appellant.

Hill & Alcorn, for appellee.

ALFRED GAMBREL v. COMMONWEALTH.

Continuances in Criminal Causes.

Upon the filing of an affidavit for the continuance of the trial of a criminal case, which is sufficient to show a good cause therefor on account of the absence of witnesses, it is within the sound discretion of the court to say for what length of time the cause should be postponed.

Dismissal of Indictment.

The dismissal of the first indictment before the formation of a jury and before assignment was not a bar to a second indictment.

APPEAL FROM BREATHITT CIRCUIT COURT.

January 23, 1880.

OPINION BY JUDGE HINES:

We are of the opinion that the court did not err in refusing to continue the cause to court in course. Sec. 315 of the Civil Code, which applies to this case, provides that, upon affidavit showing the materiality of evidence and that due diligence has been used to secure the attendance of the witnesses, a postponement may be had, not, in the ordinary acceptance and interpretation of the section, a continuance to the next term of the court; nor does it mean an indefinite or arbitrary postponement, but a suspension of the proceedings a sufficient length of time to enable the accused, by the exercise of ordinary diligence, to secure the attendance of the witnesses.

It must be admitted that the affidavit showed the materiality of the evidence and that reasonable diligence, under the circumstances, had been used to secure the attendance of the witnesses. But the court on the affidavit proposed to postpone the case one or two days to enable the accused to get the witnesses, and this offer was refused, and while refusing it no further time was asked, nor any intimation given that the witnesses could not be procured within that time, nor that they could be procured at any time however distant. It appears to us

that it was within the sound discretion of the court to say for what length of time the cause should be postponed, and that on an offer to postpone to a certain time it became the duty of the accused, if he deemed the time too short, to make known to the court his desire and the necessity for further postponement. He certainly was not entitled to an indefinite postponement, and if not he should designate some time within which it would appear that he had reasonable grounds to believe he could secure the attendance of his witnesses.

So far as we are able to learn from the record, which is prepared in such a way as to render it difficult to ascertain what was done or when an order was made, it appears that some of these witnesses afterward came into court and were examined, and that others were beyond the reach of the process of the court.

We do not think that the indictment is subject to the objection of counsel that it charges more than one offense. It is one and the same offense charged in three several forms. The dismissal of the first indictment before the formation of a jury and before assignment was not a bar to the second indictment. Appellant was never placed in jeopardy on the first.

The failure of the clerk to qualify the person claimed to have been chosen by the appellant to try the case cannot be inquired into. We cannot go behind the certificate of the clerk and the commission of the governor to determine whether the clerk was mistaken in certifying that no election could be had. In the judgment of the clerk, he is not liable for such a mistake, if any, nor can his action be collaterally questioned; but for issuing a fraudulent certificate on which a commission is based there might be a remedy against the clerk, and notwithstanding that fact the commission would be valid.

It was not error to allow the official character of Judge J. W. Burnett to be shown to the jury by the order read for that purpose. nor was it error to allow the order appointing or directing guards to be summoned to be read to the jury. It is charged in the indictment that Judge Burnett, while acting in the discharge of his duty as county judge and a conservator of the peace, was killed. It was proper to show all the facts and circumstances surrounding the parties at the time of the killing and the relation of the parties, so tending to account for the affray and bearing upon the question of the existence of malice.

The court properly refused to let C. O. Caldwell testify. He is charged in the indictment as one of the conspirators, and the evidence

shows him to have been with his co-conspirators at the beginning of the fight, with a pistol in his hand. He was not one of the guards summoned to guard the prisoner, Little, and his presence under the circumstances is not easily accounted for except upon the supposition that he was there for the purpose of assisting in resisting the officers of the law and to take the life of Judge Burnett. This is not the case presented in *Christian v. Commonwealth*, 13 Bush 264. The circumstances as developed in the evidence show, with reasonable certainty, the connection of Caldwell with the conspirators in the accomplishment of their felonious purpose.

Counsel for appellant points out in his brief no specific objection to the instructions, nor have we been able, after a careful investigation, to discover any cause for complaint in this regard. The instructions appear to present the law with unusual perspicuity and comprehensiveness. The whole law of the case was given.

Judgment *affirmed*.

Judge Hargis not sitting.

John E. Cooper, for appellant. Hardin, for appellee.

THOMAS H. ELLIS, ET AL., v. JAMES HITE, ET AL.

Life Tenant Liable for Taxes.

Where real estate is held by one for life and by others in remainder, under a sale made for taxes, the purchaser cannot hold the interest of the remaindermen. The life tenant is alone liable for the taxes, and if the purchaser at tax sale obtained any title it was but the life estate.

APPEAL FROM NELSON CIRCUIT COURT.

January 23, 1880.

OPINION BY JUDGE PRYOR:

The husband of one of the parties entitled in remainder (or his heirs) is endeavoring to claim the real estate in controversy under a sale made for taxes, and to hold it against the other devisees. The life tenant was alone liable for the taxes, and all the title appellants' ancestor obtained, if any, was the life estate; and if not, the purchase by appellants' ancestor would enure to the benefit of all under the proof in this case, and after refunding the money advanced, if any, the estate would be divided according to the provisions of the will.

Judgment *affirmed*.

Muir & Wickliffe, for appellants. C. T. Atkinson, for appellees.

J. J. CORNELISON, RECEIVER, v. ASA B. GATEWOOD.**Interest Acquired Pendente Lite.**

One acquiring property then in litigation is bound by the result of such litigation.

Receiver Bound to Obey Court's Orders.

Because a receiver is named as a garnishee defendant, constitutes no good reason which entitles him to assume the position of a litigant in the suit in which he was receiver and to set up and rely upon the claim of attaching creditors as a reason why he shall not obey the order of the court by which he was appointed.

APPEAL FROM MONTGOMERY CIRCUIT COURT.

January 30, 1880.

OPINION BY JUDGE COFER:

The appellant has no right to complain of the judgment appealed from. What he has in his hands and the amount he was ordered to pay to the appellee is not disputed. The fund was in litigation when Turner assigned his interest in it to Yocum, and when the interest so assigned was attached by Yocum's creditors.

Yocum took subject to the result of that litigation, and his creditors could not acquire other or greater interest or a more favorable position by their attachment than he had, and the order appealed from, when obeyed, will amply protect the appellant. That he is made a party and garnishee in the suit of Yocum's creditors does not entitle him to assume the position of a litigant in the suit in which he was receiver, and to set up and rely upon the claim of the attaching creditors of Yocum as a reason why he shall not obey the order of the court by which he was appointed.

Turner is bound by the order confirming the report as corrected and ordering the appellant to pay out the money, and Yocum and his attaching creditors are also bound because they acquired their interest pendente lite. The appellant has no interest in the question whether Turner's assignee is entitled to the fund, any more than he would have if Turner had not assigned his claim, and the appellant, conceiving that injustice had been done to Turner, sought to obtain a reversal for Turner's benefit.

He does not seem to have committed himself by his answer in the attachment suit, but if he has he cannot obstruct the settlement of his accounts as receiver on that account. If he has made an improvident answer it is his own fault, and he cannot shift its consequences

on to those who were parties to the suit in which he was receiver, and for whom he held the money in his hands.

Wherefore the judgment is *affirmed*.

Tyler & Hazelrigg, for appellant. Reid & Stone, for appellee.

WILLIAM KILPATRICK, ET AL., v. CHARLES R. MCGILL.

Principal and Surety.

When the relation of principal and surety exists, the creditor, by entering into a contract with the principal debtor, without the consent of the surety, to extend the time of payment, injures the surety by depriving him of his right to have the debt made out of the principal's property before his insolvency or of paying the debt himself and taking steps to protect himself; but where the surety has in his own hands ample surety to protect him he is not injured by such extension of time of payment, and will not be discharged by reason of it.

APPEAL FROM LARUE CIRCUIT COURT.

January 31, 1880.

OPINION BY JUDGE COFER:

The rule which exonerates a surety in consequence of some act or omission on the part of the creditor is based on the peculiar nature of the contract and the relation between the parties.

Judge Strong says the contract of suretyship imports entire good faith and confidence between the parties, and treats the relation between the creditor and the surety as analogous to the relation between trustee and cestui que trust, guardian and ward, and partner and partner. Secs. 322, 323 and 324, Equity Jurisdiction. It is because of this relation that any act or omission on the part of the creditor that is prejudicial to the surety is held to discharge the surety from liability, and hence it has been held that an agreement for forbearance does not release the surety unless the creditor was aware of the fact that he was only surety. *Neel v. Harding*, 2 Met. 247.

In this case there was no relation of trust or confidence between the parties. The appellee was under no legal or equitable obligation to protect the appellants against loss, and hence did not violate their rights in any way by agreeing to extend the time of payment. The deed containing the lien to secure the note was of record, and the

appellants must be presumed to have had notice of its existence, and they should have taken steps to protect themselves.

Again, the creditor who makes with the principal a valid agreement to forbear not only increases the risk of the surety by postponing the time of payment and prolonging the period of his liability, but he deprives the surety of the right to pay the debt and seek immunity at once or to proceed against the principal to compel him to pay the debt.

But no such injury was done to the appellants in this case. At the time the agreement was made to extend the time they owed Vanhart a sum larger than was due on the note held by the appellee, and they had their indemnity in their own hands; and if they had been sued by Vanhart they had a complete defense to his action to the amount of the note held by the appellee, which would not have been the case if they had been personally bound as sureties on the note, for in that case their simple liability as sureties would not have constituted a defense.

For these reasons we are of the opinion that the court did not err in sustaining the demurrer to the original answer or in refusing to allow the proposed amendment to be filed.

Judgment affirmed.

Reid & Twyman, T. A. Robertson, for appellants.

A. B. Montgomery, for appellee.

SHELBY COUNTY COURT *v.* HENRY HARRIS, ET AL.

J. A. PAYNE, ET AL., *v.* SHELBY COUNTY COURT, ET AL.

Power to Levy Taxes.

The power to levy taxes is left to the court of claims of each county and it must alone judge of the necessity for imposing such a burden, and it cannot be held to have the power to leave such taxation to the discretion of the sheriff.

APPEAL FROM SHELBY CIRCUIT COURT.

January 31, 1880.

OPINION BY JUDGE PRYOR:

No tax had been imposed by the county court of Shelby under the provisions of the act in question for turnpike purposes, and that it was an annual tax to be collected when directed by the county court

is manifest from the amendment of the original act. It was to be collected as the county court might order, and no express power was given (and none can be raised by implication) the sheriff by the act or by the county court to collect any such tax. It was and is necessary for the court of claims under this legislative power to make a formal levy of the tax. That court must alone judge of the necessity for imposing such a burden, and to leave such taxation to the discretion of the sheriff would be unheard of legislation, and no such construction should be given it, if susceptible of any other. The language and meaning of the act is too plain for construction, and the court below acted properly in sustaining the demurrer. That the sheriff and the county court construed the act so as to authorize the sheriff to collect without any action of record by the county court cannot affect the rights of the sureties, but as to the sheriff who has seen proper to impose it for the public good and has collected it by the consent of the county court and the taxpayer he must be held responsible.

Judgment *affirmed* on each appeal.

Caldwell & Harwood, for County Court.

L. A. Weakly, for Payne. Bullock & Beckham, for Harris.

P. F. CRAYCROFT'S ADM'R *v.* JOHN CLAY'S ADMR., ET AL.

Administrator De Bonis Non.

An administrator de bonis non cannot maintain an action against his predecessor for a settlement. Such action can only be maintained by a creditor or distributee.

APPEAL FROM NICHOLAS CIRCUIT COURT.

February 3, 1880.

OPINION BY JUDGE COFER:

An administrator de bonis non cannot maintain an action against his predecessor in office for a devastavit, or for a settlement. Such actions can only be maintained by a creditor or distributee. *Felts v. Brown*, 7 J. J. Marsh. 147; *Lawrence's Adm'r v. Lawrence*, Litt. Sec. Cas., 123; *Warfield v. Brand*, 13 Bush 77.

As the appellant had no right to maintain the action his rights were not prejudiced by its dismissal.

Judgment *affirmed*.

Hargis & Nowell, for appellant. Ross & Kennedy, for appellees.

CHARLES DAVIS *v.* J. A. KITHCART.**Supersedeas Bond and Writ.**

A supersedeas bond will not supersede a judgment until a writ of supersedeas has been issued, and hence in a petition upon such a bond the plaintiff is required to aver that a supersedeas issued.

APPEAL FROM KENTON CIRCUIT COURT.

February 3, 1880.

OPINION BY JUDGE COFER:

A supersedeas bond will not operate to supersede a judgment. Until a writ of supersedeas has been issued the plaintiff may proceed to collect the judgment, notwithstanding a bond has been given. It is only when the judgment has been superseded that the surety in the supersedeas bond becomes liable, and consequently it is necessary when declaring upon such a bond to allege that a supersedeas issued. *Reed v. Lander*, 5 Bush 598; *Jones v. Green*, 12 Bush 127.

That the petition does not contain a statement of facts constituting a cause of action is a defect not waived by a failure to demur or plead in the court below. Section 93, Civil Code.

Judgment *reversed* and cause remanded for further proper proceedings.

Benton & Benton, for appellant. *H. P. Whittaker*, for appellee.

RICHARD TAYLOR *v.* COMMONWEALTH.**Criminal Law—Change of Venue.**

An application for a change of venue in a criminal case must be in writing, sworn to by the defendant, and the applicant must produce and file the affidavits of at least two other credible persons not relatives nor of counsel for the defendant, and the court may hear evidence orally or by affidavit in order to determine the facts as to the credibility of the witnesses making the affidavits for the change of venue.

APPEAL FROM CUMBERLAND CRIMINAL COURT.

February 3, 1880.

OPINION BY JUDGE HINES:

Sec. 1, Art. 4, Chap. 12. Gen. Stat., provides: "That when a criminal or penal prosecution is pending in any court, the judge

thereof shall, upon the application of the defendant, order the trial to be had in some other adjacent county to which there is no valid objection, if it appears that the defendant cannot have a fair trial in the county where the proceeding is pending."

Such application must be made by petition in writing, verified by the affidavit of the defendant; and the applicant must produce and file the affidavits of at least two other credible persons, not of kin to nor of counsel for the defendant, stating they are acquainted with the state of public opinion in the county or counties objected to, and the attorney for the commonwealth must have reasonable notice in writing of such application.

The first question presented on the appeal is: Should the court below on such application hear evidence as to the credibility of the parties making the affidavit provided for in the last clause of the section quoted above?

It will be observed that it must be made to appear to the court below that the defendant cannot have a fair trial in the county where the prosecution is pending, and that the application for the change of venue must be accompanied by the affidavits of the accused and of at least two other credible persons. Two things must concur to secure a change of venue. First, that the court must believe that the accused cannot have a fair trial in the county where the prosecution is pending; second, that the evidence upon which the court is authorized to reach a conclusion favorable to the application shall consist of the testimony of at least two credible witnesses not of kin nor of counsel to the applicant. As the statute provides no method by which the credibility of the affiants are to be tested it seems to us proper that the court should hear evidence by affidavit or by oral statement, as may suit the convenience of the court, in order to determine the facts as to the credibility of the witnesses making the affidavits for the change of venue. Otherwise the ends of justice might be defeated by the affidavits of persons publicly known to be corrupt and unworthy of belief on oath.

Such a construction, when the court exercises a sound discretion, can work no great hardship to the accused. In this instance, however, we think the court, before overruling the motion for a change of venue, should have allowed the accused an opportunity to produce other affidavits in support of his application, and if any two were found to be credible and not of kin nor of counsel the change of venue should have been allowed. For the failure of the court to

give reasonable time to file such additional affidavits before overruling the motion the case should be reversed and an opportunity allowed the accused to offer such additional affidavits.

The court also erred in overruling the motion for a continuance and in rejecting the testimony as to the character of Mrs. Davis during the war. Evidence was already in as to her character at the time she testified, which rendered the evidence as to character anterior competent, as decided by this court in the case of *Mitchell v. Commonwealth*, 78 Ky. 219.

Judgment *reversed* and cause remanded with directions for further proceedings consistent with this opinion.

R. F. Spencer, for appellant. Hardin, for appellee.

R. M. PARKS & Co. v. H. S. SHANNON & Co.

Admissibility of Evidence.

Where one member of a partnership contracted with the defendant and other employes of the firm for board, the board to be paid out of merchandise purchased from the partnership's store, it is error for the court to exclude such evidence from the jury. While one member of a firm cannot contract to pay his individual debts out of partnership property, the jury might imply the authority and particularly in reference to the board of the employes of the firm.

Bill of Exceptions.

Where a bill of exceptions is presented to the court in time and offered for filing, but not filed because the judge took time to consider it, such bill is a part of the record.

APPEAL FROM NICHOLAS CIRCUIT COURT.

February 3, 1880.

OPINION BY JUDGE PRYOR:

The court below erred in excluding from the jury the testimony of the witness tending to show that one of the plaintiffs contracted with the defendants for his board and that of the employes of the firm to be paid out of tin wares or merchandise purchased by the defendants from the firm of Shannon & Co. It is shown in evidence that one of the plaintiffs constituting the firm resided in Cynthiana and the other in the town of Carlisle and that the partner in Carlisle was the managing partner and transacted the entire business, or nearly so, of the firm. While one partner cannot contract to pay

his individual debts out of the partnership property we think the facts in this case might have authorized the jury to imply the authority, and particularly in reference to the board of the employes of the firm. In fact we do not see why one partner may not bind the firm to pay for the board of those who are transacting their business, and whose services are necessary to its successful prosecution.

The fact that similar contracts had been made with others is, however, incompetent, and was properly excluded. The bill of evidence is properly in the record. At the September term of the court there was given the appellant until the third day of the next term to file its bill of exceptions. At the next term the order recites that: "The bill of exceptions tendered and prayed to be made a part of the record by the defendant on a previous day of the term, viz.: the second day of the term, which was held up for consideration by the court, is now signed." The appellant had the right to tender his bill prior to the third day of the term, and having tendered it on the second day and prayed to have it made part of the record, nothing more was required of him. The court took it for consideration, and there was no mode of compelling the judge to have the bill filed or made part of the record. Further time was not given the defendant to file his exceptions, but he seems to have been ready, and offered to file on the second day, when they were taken by the court for consideration. It seems to us that the record of that term of the court showing the offer to file was made and the bill actually tendered at a proper time, is all that should be required and is a compliance with the Code. We will not discuss the pleadings further than to say that it is a matter of great doubt whether there is a specific traverse of any allegation made in defendant's answer. As the case must go back either party may amend.

Judgment *reversed* and cause remanded for further proceedings.

Ross & Kennedy, for appellant. C. W. West, for appellee.

CHARLES GODSHAW, TRUSTEE, ET AL., v. G. ROBERTS, ET AL.

Compensation of Jurors.

One called from the bystanders to serve on the jury and who is not a member of the regular panel is not entitled to compensation unless he serves more than one day.

APPEAL FROM LOUISVILLE CHANCERY COURT.

February 3, 1880.

OPINION BY JUDGE PRYOR :

The appellant, as trustee of the jury fund, was not indebted to the appellee, and after the allowance had been made to the juror (appellee) the court below directed his imprisonment, not only for contempt, but as a means of coercing the payment of the money, and from that order the appellant has appealed. His refusal to pay the juror and the order directing his imprisonment until paid, necessarily involves the validity of the order directing its payment. The case of *Ex parte Herrick*, 78 Ky. 23, presented the question as to the right of a policeman of the city of Louisville to compensation as a witness in behalf of the commonwealth in a prosecution for felony. This court entertained jurisdiction on the idea that it was not a judgment for money nor embraced within the first and second sections of Art. 22 of Chap. 28, General Statutes; nor is the allowance in this case to be regarded as a judgment for money, and therefore the whole question as to the propriety of the allowance, as well as the mode of coercing its payment, will be considered.

The principal question in the case is: Is a bystander who is sworn and serves as a juror for only one day and is then discharged to be paid as jurors forming the regular panel? The 12th section of Art. 5, Chap. 62, Gen. Stat., expressly provides that: "Bystanders summoned and not sworn as jurors shall be discharged without pay. If sworn and serve more than one day at any one time, they shall be paid as other jurors."

That the jury in this case was summoned by order of the chancellor cannot affect the construction to be given the statute, and if the chancellor was entitled to a regular panel as in the circuit court, the juror, if a bystander and serving only one day, would not be entitled to compensation. A bystander is one who does not constitute a part of the standing jury or the jury summoned for the term. A standing jury is the one selected by the jury commissioners in accordance with the statute, or if no commissioners have been appointed for that purpose, the jury summoned by the sheriff under the order of court constitute the regular panel.

All others summoned as jurors are only bystanders, and when summoned must serve longer than one day before an allowance can be made for their services. The circuit judge, county judge, police judges, etc., all have jurisdiction to hold inquests of lunacy, and a jury empaneled and sworn to try the particular case, and not serving longer than one day, is not entitled to an allowance unless it is the

standing jury selected in accordance with the statute and then discharging its duties as such or summoned as the regular panel for the term.

The chancery court of Louisville has no regular panel or standing jury, and therefore all the jurors summoned by order of the chancellor must be regarded as bystanders and embraced by the provisions of Sec. 12, Art. 5, Gen. Stat., already cited. Nor would the rule be changed if a jury of bystanders had been ordered to be summoned by the circuit judge. It sometimes happens that the regular panel is deliberating on issues already submitted for their consideration, and the court from necessity is compelled to summon a jury of bystanders to pass upon questions of lunacy, etc. In all such cases the juror is not entitled to pay unless he serves more than one day.

The protection the law gives to each individual citizen, in respect to both his person and property must be regarded as ample consideration for the services rendered, and while it may be inconvenient for the man of business to respond in person to the summons of the chancellor it is a part of the public burden he should cheerfully bear without any nominal consideration.

The order directing the imprisonment of the appellant as well as the allowance should be set aside, and a reversal is directed for that purpose.

P. W. Hardin, for appellants. C. B. Seymour, for appellees.

WILLIAM VEATCH v. W. B. TATURN, ET AL.

Judgment for Costs by Mistake.

Where the trial court directed that no judgment should be entered against the appellant for costs, and the attorney drawing the entry by mistake drew up a judgment for costs against him, and no minutes or memorandum is referred to, and where there is no means of establishing the mistake except to prove it by oral testimony, it cannot be allowed, as such evidence is not admissible to correct such judgment.

APPEAL FROM MARION CIRCUIT COURT.

February 4, 1880.

OPINION BY JUDGE COFER:

The allegations in the petition amount to no more than this, that the judge directed that no judgment should be entered against the

appellant for costs, and that by mistake the attorney drew up a judgment against him for the costs of the action. Nothing is alleged which conduces in the remotest degree to prove fraud.

No minutes nor memorandum is referred to, and so far as appears the only means of establishing the alleged mistake would be to prove it by oral testimony. This certainly could not be allowed. Such a practice would greatly impair the records of courts and would lead to the most disastrous results. It would make the rights of litigants and the evidence of the decisions of the courts to depend upon the memory of witnesses, rather than upon the verity of public records.

The law, to guard against such mistakes, directs that the orders of each day shall be publicly read on the succeeding day, and parties and attorneys may, by attending to the reading, generally protect themselves against such mistakes, and an occasional failure and consequent injustice will be more than compensated by the greater sanctity of public records resulting from the rule excluding parol evidence in a case like this.

Moreover, it is exceedingly questionable whether if the judgment complained of were set aside the court would not be compelled to re-enter the same judgment. Secs. 12 and 13, Chap. 26, Gen. Stats. This is not of the class of cases in which the court has a discretion in awarding costs to the successful party.

Judgment affirmed.

W. B. Harrison, for appellant. Belden & Shuck, for appellees.

H. B. SPOONER *v.* J. M. BEST'S EX'R.

Liability of Sureties on Supersedeas Bond.

Where the clerk was authorized to take a bond and execute a supersedeas, if the parties voluntarily interposed and gave such bond and procured the issuing of such writ, and thereby stayed execution, there is no reason why they should not be held liable.

APPEAL FROM McCracken COURT OF COMMON PLEAS.

February 4, 1880.

OPINION BY JUDGE PRYOR:

It is evident from an inspection of the original bond on file in this court that it bears date on the 25th of June, and not the 28th of that month. Both the clerk and his deputy swear positively to the fact

that the bond was executed at the time it bears date, and detail circumstances transpiring at the time, from which they are able to make this statement without regard to the endorsement on the bond. These witnesses stand unimpeached, and their testimony uncontradicted. Experts say that the date has been altered, but this is not sufficient to invalidate the statements made by the clerks, aided by the endorsement on the bond. Nor is the fact that copies had been made with the date the 28th instead of the 25th to be relied on to overthrow this positive and uncontradicted testimony for the appellant.

Those who ought to know when this bond was executed have sworn that it bears its true date, and if altered, by whom was the alteration made, and when? If the figure "8" had been made and the figure "5" afterward made over it, it by no means follows that it was done at a time subsequent to its execution and certainly this will not be presumed, when there is direct and positive testimony as to the time of its execution. The verdict, therefore, should have been for the appellant, or, if not, the chancellor, when called on to allow the claim, should have disregarded it. Nor, in our opinion, is it material whether the bond was executed on the 25th or the 28th, the parties being liable in any event. The judgment, the issuing of the execution, the service of the supersedeas, the appeal and its affirmation, and the subsequent insolvency of Brazelton, are all facts admitted by the answer, the only defense being that the clerk had no authority to take the bond or issue the supersedeas.

If these parties have voluntarily interposed, and by the execution of this bond and issuing of a supersedeas stayed the execution and prevented the payment of the money, there is no reason why they should not be made liable. They were not compelled to execute the bond by an officer who had no authority to make such a demand of them, but they voluntarily, if their view be a correct one, sought one who had no such authority, and required him to take a bond that had the effect to stay all proceedings on the judgment until the case was tried and disposed of in this court, and neither the principal nor surety will be allowed to avoid responsibility by reason of their illegal act. They accomplished by that proceeding, although illegal, all that could have been attained if the appeal had been obtained in this court.

The case of *Jones v. Green*, 12 Bush 127, was on demurrer to the petition in which there was no allegation that a supersedeas bond had issued, and while some allusion is made in the opinion as to want of

authority on the part of the clerk to accept the bond or issue the supersedeas, it was not intended to decide that the surety is not liable for the damages sustained, although the clerk may have had no authority to accept the bond or issue the supersedeas. If by so doing he has injured the party complaining, a liability exists. This view is sustained by the whole current of authority in this state. It is unnecessary, however, to pursue this view of the question presented, as the proof authorized a judgment for the appellant, the bond having been executed on the 25th and not the 28th of the month. No demand was necessary to be made of the administrator. The action had been instituted in the lifetime of Best. It was consolidated with the action for a settlement of the estate, and an affidavit had been made to the claim as the law required.

The judgment is *reversed* and cause remanded with directions to sustain the attachment and allow the claim of appellant, and for further proceedings.

Bigger & Reid, for appellant.

C. S. Marshall, Sam Houston, for appellee.

CITY OF LEXINGTON *v.* O'CONNOR, ET AL.

City's Power to Fix Fees of Witnesses.

The law prescribes what fees witnesses are entitled to, and a city has no power by ordinance to increase or diminish such fees; and the case is not altered by the fact that the witnesses were subpoenaed in cases arising under city ordinances.

APPEAL FROM LEXINGTON CITY COURT.

February 5, 1880.

OPINION BY JUDGE COFER :

The laws of the state fix the fees of witnesses, and these laws apply to witnesses attending any and all courts established by the laws of the state, whether such courts are established by general or local statutes; and the mayor and council of the city of Lexington had no power to enact an ordinance to increase or diminish the fees of witnesses appearing in the recorder's court in obedience to the summons of the commonwealth. The commonwealth compels their attendance and fixes their compensation just as it fixes the compensation of witnesses attending upon other courts.

That the witnesses were summoned in cases arising under the ordinances cannot alter the case. The ordinances exist by authority of and are to be enforced in a court created by the commonwealth, and an ordinance which fixes witnesses' fees at 25 cents per day is in conflict with the statutes of the state, and is void.

Judgment affirmed.

M. A. Smith, for appellant.

WILLIAM LEE v. COMMONWEALTH.

Criminal Law—Instruction.

Even an erroneous instruction as to involuntary manslaughter is harmless, where a correct instruction as to voluntary manslaughter is given and the jury finds the defendant guilty of murder.

APPEAL FROM WOODFORD CIRCUIT COURT.

February 6, 1880.

OPINION BY JUDGE PRYOR:

We cannot see how the accused was prejudiced by the refusal to give the instruction in regard to involuntary manslaughter, when the jury have, with a proper instruction in regard to voluntary manslaughter, found him guilty of murder. They have found him guilty of the higher offense with an instruction that if they entertained a doubt as to the degree of the offense they should inflict the lower punishment.

Nor are we prepared to say under the facts of this case that the court should have given an instruction in regard to involuntary manslaughter. It was a killing without an excuse, and this court will not reverse for an error that could not have prejudiced the accused. Nor was the refusal to permit the witness to answer the question as to the declaration made by some one present at the time of the killing, that deceased had struck the accused on the nose, prejudicial to the accused. The nose of the accused was bleeding at the time. His own declarations that he had been struck by the deceased were admitted without objection, or if objected to the objections were withdrawn. Martha Bearly testified that when Bill came to her room his nose was bleeding very much, and when asked what was the matter, said that he had struck Simon, and that Simon had struck him on the nose and he could not stand it.

The jury could not have but considered all the facts upon which the accused based his defense, or for the purpose of mitigating his punishment. The comment of the court in regard to the condition of Simon when struck, as to the latter's capacity to understand what was transpiring at the time could not have influenced the jury. The blow was struck, the man knocked senseless in the fire, and died from the effect of the blow in a few hours. If the striking was in sudden heat and passion the jury had all the facts to enable them to pass on the question, not only the facts occurring at the time the blow was inflicted, but the declarations of the accused made in his own defense some ten or fifteen minutes after the blow was given. We see nothing in the record authorizing a reversal.

Judgment *affirmed*.

Porter & Wallace, for appellant. Hardin, for appellee.

ALICE RICE'S G'D'N *v.* LYDIA P. RICE, ET AL.

Evidence.

It is always competent to prove that no money was in fact paid, although the party offering the evidence may have given a receipt acknowledging payment.

Vendor's Lien.

Where a lien for balance of purchase-money is expressly retained in a conveyance of real estate a subsequent conveyance will not discharge it.

APPEAL FROM BOYLE COURT OF COMMON PLEAS.

February 6, 1880.

OPINION BY JUDGE COFER:

Anderson Rice was not a competent witness to prove the alleged agreement between himself and Thomas A. Rice to credit Alice Rice's interest in the proceeds of the sale with her board. Subsec. 2, Sec. 606, Civil Code, expressly disqualifies him.

His evidence being excluded, there remains nothing to prove that any such agreement was ever made, and as it is not pretended that the balance after deducting the check for \$200 was paid in any other way, it is clear that such balance remains unpaid.

Whether the \$200 was paid on account of the land is a question not free from doubt, but we incline to the opinion that it was. The

check was made payable to Thomas Rice, and not to Thomas Rice, guardian, which affords some evidence that it was not a payment on account of the land, and especially in view of the fact, shown by the evidence, that Anderson Rice was indebted to Thomas on account of a payment made for him as surety.

But Alice's guardian introduced the statement of Anderson in evidence, and in that statement he is proved to have said he paid about \$200 on the land. This is, we think, sufficient to entitle Mrs. Rice to credit for the amount of the check.

We attach no importance to the charge that Thomas Rice was incapable of transacting business at the time the receipts were given, nor to the evidence on that subject. But it is always competent to prove that no money was in fact paid, although the party offering the evidence may have given a receipt acknowledging payment. *Gordon's Heirs v. Gordon*, 1 Met. 285.

The evidence, excluding the illegal testimony of Anderson Rice, shows affirmatively that only \$200 have been paid, and the only remaining question is: Has Alice a lien on the interest in the land formerly owned by her to secure the payment of the balance due? We think she has. A lien was expressly retained, and the subsequent conveyance did not discharge it. Sec. 24, Art. 1, Chap. 63, Gen. Stat.; Sec. 699, Civil Code.

That the record of the case in which the judgment for the sale of the land was rendered is not before this court will not authorize us to presume that the judgment was right. That record cannot be supposed to contain any fact illustrating the issue in this case.

The judgment rendered on the second paragraph of the petition is not before us, but as the appellant is not entitled to a judgment against the sureties for more than \$200, and as the claim against them in excess of the amount is wholly inconsistent with the claim asserted in the first paragraph, they may be required to release all of that judgment except \$200 before being permitted to take a judgment enforcing the lien on the land.

Judgment *reversed* and cause remanded for further proceedings not inconsistent with this opinion.

Fox & Fox, for appellant.

Durham & Jacobs, for appellees.

EMELINE BLANCOE v. WILLIAM ELLIOTT.

Conveyance by Infant.

The period at which a person shall be deemed of age in order to bind himself or herself by contract is arbitrary, and may be changed by the legislature at any time.

APPEAL FROM NELSON CIRCUIT COURT.

February 11, 1880.

OPINION BY JUDGE HINES:

The act of February 28, 1835, conferred upon Mrs. Emeline Blancoe the same power, in conjunction with the husband, to sell and convey the land in controversy, that she could have exercised had she been over twenty-one years of age. The period at which a person shall be considered of age, in order to bind himself or herself by contract, is arbitrary, and may at any time be changed by the legislature. To do this it is not necessary that the act should recite that it is passed for the purpose of removing the disability of infancy; it is enough as in this case, that the power to convey is conferred. The act takes hold of the person and the subject-matter in the condition in which they are found at the date of its passage as effectually as if it recited the disability intended to be removed.

The deed appears to have been freely and properly acknowledged, and a valuable consideration in good faith paid. We perceive no reason for disturbing the judgment of the court dismissing the petition.

Judgment affirmed.

C. T. Atkinson & A. J. James, for appellant.

E. E. McKay & Wm. Johnson, for appellee.

JANE P. MASSENGALE'S ADM'R v. MARCY C. MASSENGALE.**Parent and Child.**

A daughter, who from the age of ten or twelve years has been raised, maintained and educated by her father and stepmother until she reaches her majority, cannot recover for her services rendered them. Her support and maintenance must be deemed compensation for the services rendered.

APPEAL FROM MARION COURT OF COMMON PLEAS.

February 11, 1880.

OPINION BY JUDGE PRYOR:

The evidence conduces to show that the appellee resided with the father and stepmother until the death of the latter, and from the age of ten or twelve years had been raised, maintained and educated by them until she reached her majority. The services performed by her were only such as she should have been required to perform, and were not more arduous than those ordinarily imposed by parents under like circumstances. Her support and maintenance must be regarded as equivalent for the services rendered, and, if not, to establish the precedent that the child or the stepchild, who has been reared as this appellee was, can maintain an action for services rendered, would throw open the doors to a character of litigation that would be without limit, and conducing to annoy and harass those to whom the children were under an obligation to obey.

It was the duty of the father to provide servants for his family, if his circumstances in life justified it, and if not it was highly proper that they should be performed by his children. The father must be the judge of the necessity for supplying hired labor, and those working for him or his wife must look to the husband for payment. The fact that the stepmother owned the estate cannot imply an obligation on her part to pay, and in this case if appellee has any remedy it is against the father, but it must not be understood, by inference or otherwise, that this court so adjudges. Certainly a different state of facts must be presented than those contained in this record before either the father or stepmother can be held responsible. The court should refuse to allow the claim.

Judgment *reversed* and cause remanded for that purpose.

Rountree & Lisle, for appellant.

Belden & Shuck, for appellee.

A. B. POWERS v. GEORGE DUNN, JR.

Non Est Factum.

Under Sec. 20, Chap. 22, Gen. Stat., if a defendant did not sign the note in suit he is not bound, although his name may have been signed by his son upon verbal authority to do so.

Admissibility of Evidence.

Where an issue is raised as to whether a defendant signed a note, the signature of such defendant to his answer and other pleadings or papers in the case are competent evidence to go to the jury as evidence by comparison that his signature to the note was in his own handwriting.

APPEAL FROM MARION COURT OF COMMON PLEAS.

February 12, 1880.

OPINION BY JUDGE COFER:

There was no evidence before the jury conducing to prove that the appellant signed the note. If he did not he is not bound, although his name may have been signed by his son upon verbal authority to do so. Sec. 20, Chap. 22, Gen. Stat.

The signature of the appellant to his answer, and other pleadings or papers in this case, was competent evidence to go to the jury, as evidence by comparison, that his signature to the note was in his own handwriting; and the statement of the appellee as to what took place between them when they met on the pike near Bradfordsville was also competent as conducing in some degree to prove that he signed the note. But the signature to the papers in the case seem not to have been submitted to the jury in evidence. They seem to have been improperly shown to the jury by counsel in argument, but they had no right to consider them when thus offered, and the signature to the petition in another case, which seems also to have been shown to them in the same way, would not have been competent if offered at the proper time.

The sole question in the case is whether the appellant signed the note with his own hand, and he is not liable unless he did so. If he promised to pay his part of the note, or recognized it as binding upon him, the fact may be shown as conducing to prove that he in fact signed it, but for no other purpose.

Judgment *reversed* and cause remanded for a new trial.

Rountree & Lisle, for appellant.

Belden & Shuck, for appellee.

ELLEN COOK, ET AL. v. J. S. MITCHELL.**Service of Process on Infants.**

When a summons is delivered to infants and a copy left with their mother, with whom they resided, such process is properly served.

Answer by Guardian Ad Litem.

Where the record fails to show that a guardian ad litem was appointed, one filing an answer purporting to be such guardian is a mere volunteer and such answer is ineffectual.

APPEAL FROM EDMONSON CIRCUIT COURT.

February 12, 1880.

OPINION BY JUDGE PRYOR:

It is not denied that the summons was delivered to the infants, or that the mother with whom they resided was served by delivering a copy to her, and, this fact appearing, the purposes of the code have been answered by the party having a summons regularly served upon one whose duty it is to protect the rights of the infants. The affidavit filed, to the effect that the infants had no guardian, is sufficient, but the trouble arises in not having a guardian ad litem to answer. There is an answer filed by one purporting to be the guardian ad litem, but he must be regarded as a mere volunteer, as no appointment was ever made. The executors are made appellees in this court, and are not objecting to the manner in which the claim is proven.

Judgment is *reversed* for the reason alone that no guardian ad litem was appointed by the court to defend, and cause remanded for further proceedings.

L. M. Hazelipp, for appellants.

ROBERT A. HOLLIS v. OWENSBORO SAVINGS BANK, ET AL.**Judicial Sale of Real Estate.**

The fact that a judgment under which land has been sold is afterward reversed will not affect the title of a purchaser at such sale.

Irregularity in Judicial Sale.

When there is such an irregularity in a judicial sale of real estate that it ought to have been set aside, even though the judgment of sale was valid, and the irregularity appears on the record, the order confirming the sale may be reversed without the judgment being reversed.

APPEAL FROM DAVIESS CIRCUIT COURT.

February 12, 1880.

OPINION BY JUDGE COFER:

The mere fact that a judgment under which land has been sold

is afterward reversed by this court will not affect the title of the purchaser. *Yocum v. Foreman*, 14 Bush 494. But when there has been such irregularity in the sale that it ought to have been set aside, even though there had been no error in the judgment, and that irregularity appears on the record, the order confirming the sale may be reversed whether the judgment under which it was made is reversed or not.

The master's report of the sale showed upon its face that he had sold the land to raise \$20 more than the judgment authorized. That was an irregularity for which the sale should have been set aside without exceptions by any one, and the order confirming the sale was therefore erroneous.

Judgment *reversed* and cause remanded with directions to set aside the sale, and for further proper proceedings.

Riley, Jolly & Walker, for appellant.

Owen & Ellis, for appellees.

GEORGE DAERSON *v.* QUINCY SHUMATE.

Sufficiency of Answer.

An answer that at the time of a sale of real estate the vendor had no title is not sufficient to put him upon an exhibition of his title; but one pleading such a defense must aver that such vendor had no title, legal or equitable, at the time of the conveyance, for he may have secured title after the sale and before the time of conveyance.

APPEAL FROM GARRARD COURT OF COMMON PLEAS.

February 14, 1880.

OPINION BY JUDGE COFER:

The answer is not sufficient to put the appellee upon an exhibition of Denny's title. The allegation is that "Denny had no title to said land at the time of the sale to the defendant as aforesaid." This may, and, as against the pleader, must be held to mean no more than that Denny had no title at the time of the execution of the notes, which does not exclude the idea that he had title when he made the deed.

It is impossible, of course, to point out the facts which show that a party has no title at all. But a party setting up a defense of that kind in a case like this should be required to state it in such manner

that there is no room to doubt that he means to say that he did not acquire any title, either legal or equitable, by the conveyance he has accepted. This he does not do by alleging that the vendor had no title at the time of the sale, and especially when it appears in the record that the contract was made some months before the conveyance.

But the answer set up a state of facts which showed that there was a mistake in reducing the contract to writing. If, as averred, it was a part of the contract that if the appellant should be unable to pay the last note at maturity he should be indulged twelve months longer on that note, the appellee had no right to a judgment to sell the land or in personam for that note.

It is needless to inquire now whether the probabilities are or are not against the truth of that averment. The demurrer admits that such was the agreement, and that it was omitted from the writing by mistake. For the error in sustaining the demurrer the judgment is *reversed* and the cause remanded with directions to overrule it, and for further proper proceedings.

W. O. Bradley, for appellant.

Anderson & Herndon, for appellee.

JAMES F. TAYLOR v. JOHN FINLAYSON, ET AL.

Surrender of Mortgage and Note Induced by Fraud.

One holding a prior mortgage does not defeat his lien by surrendering it and the note secured by it, where he is lead to do so by being given a check for the amount, and upon representations that the check would be paid and that the money was in the bank, but such check is protested and never paid.

Second Mortgage Lien.

One holding a second mortgage does not become a first lienholder when the first mortgage is satisfied of record by reason of false representations of the debtor, who gives a worthless check in payment, and the second mortgagee has parted with nothing on the strength of such release.

APPEAL FROM CARTER CIRCUIT COURT.

February 17, 1880.

OPINION BY JUDGE PRYOR:

The right of the partner to execute the mortgage is no where questioned by any pleading, and the company or firm name appear-

ing to it, signed by one of the partners, is sufficient to make it a valid instrument, and create a lien on the property. Besides, the objection, if fatal to the appellant, would be equally as fatal to the mortgage executed to Lane & Bodly. The only question presented by the record is as to the priority of liens.

All the creditors are in equity asserting their liens, and the prior equity must prevail. The attempted payment by the firm of Chiles & Co. to James Taylor did not have the effect to discharge the debt or release the lien, and as between the parties to the mortgage there can be no doubt as to appellant's right to enforce it. The check of a married woman was given for the debt or its payment, on the representation that she would pay it, and not only so, but had the money in bank for that purpose. The married woman was a non-resident, and the appellant, relying solely on this and the representations of the debtors, surrendered his note and released his lien. The check was protested and has never been paid. The mortgagors recognized their liability still on the mortgage when informed of the protest of the paper, and as between them the mortgage can be enforced.

If no payment has been made by the real debtors, how does this affect the rights of Lane & Bodly or the attaching creditors? The attaching creditor has made no purchase, and is asserting an equity of later date than that asserted by the appellant. The mortgagees, Lane & Bodly, advanced no money on the faith of the release, and the mortgage was on record without any evidence of a satisfaction. They have attempted to secure an antecedent debt by the execution of the mortgage to them, and have really lost nothing by the act of the appellant. They are not to be regarded in the light of purchasers for value, and no equitable estoppel can be pleaded, as no injury has resulted to them. They have neither advanced money nor released any lien given to secure their debts. Appellant's lien was superior, and as it has never been discharged, nor the appellees acted upon it so as to cause them any loss, we see no reason why the equity of the appellant should not be enforced as against Lane & Bodly.

The judgment below is therefore *reversed* and cause remanded for further proceedings not inconsistent with this opinion.

E. F. Dulin, for appellant.

L. T. Moore, E. B. Wilhoit, William Bowling, for appellees.

JAMES M. FORSYTHE, JR. *v.* R. B. GEORGE, RECEIVER, ET AL.

Levy on Exempted Property.

It is the duty of one causing a levy to be made on exempted property to see that the proceeds are paid to the person entitled to such exemption.

APPEAL FROM WOODFORD COURT OF COMMON PLEAS.

February 17, 1880.

OPINION BY JUDGE PRYOR:

There can be no question but that the lien of the appellant was superior to the lien acquired by any of the attaching creditors, but his lien was subordinate to the claim of the debtor and his family to the value of the exempted property sold. The attachments levied by other creditors was not upon the property exempt from execution or distress warrant, and that issued by the appellant, or at his instance, embraced all the property not previously attached, including the property exempt from the payment of debts. It was the duty of the creditor, and particularly the appellant, who had a prior lien, to see that he was getting no part of the proceeds of the sale of the exempted property, and, in the distribution of the proceeds, to provide against the contingency that has resulted in making him liable. The failure to supersede or file the mandate could not have affected the rights of the appellees, as every creditor, including the appellant, had committed a wrong in appropriating to the payment of their debts property that could not be made liable therefor.

The appellant is entitled to the money paid to other creditors, as he had a superior lien, but, as against the widow, her lien was superior to his; that is, having levied on the exempted property, it was his duty to see that the proceeds were paid to the widow. He stood by and saw this money paid out without any objection, and when he knew the widow was prosecuting an appeal that would or might result in giving her the money to which she is now entitled. The widow will not be required to look to the insolvent creditors, for the reason that, to the extent of the exempted property sold, her right or claim is superior to that of any other creditor. The only

remedy for the appellant is to pursue the parties to whom the money was paid.

Judgment *affirmed*.

Nat Gaither, O. S. Poston, for appellant.

T. H. Hanks, for appellees.

FRED MIRDLE v. COMMONWEALTH.

Criminal Law.

In the absence of a statute it is not a felony to steal or injure a dog.

Sufficiency of Indictment.

An indictment is not sufficient which charges that defendants confederated together for the purpose of alarming and intimidating one at his own house, and cut and injured his dog. It is not enough that the prosecuting witness was alarmed or intimidated by the injury inflicted on dog; it must appear that he was alarmed and intimidated by the defendants, and further that they went to his house, not to injure the dog, but to alarm and intimidate him.

APPEAL FROM BELL CIRCUIT COURT.

February 18, 1880.

OPINION BY JUDGE PRYOR:

The only offense charged in the indictment for which the punishment by confinement in the penitentiary in this case has been inflicted is, that the parties confederated together for the purpose of alarming and intimidating one Kellner at his own house, and cut and injured a dog, the property of said Kellner.

The act under which this indictment is framed does not in express terms or by implication abolish the common-law rule in regard to felonies, and while the owner may have his redress by a civil action for an injury to his dog, or for the reason that he has been wrongfully deprived of the animal, still it was not a felony at common law to steal the dog; nor is an injury to it such an invasion of the right of property as makes the offense a felony, in the absence of any statutory regulation changing the common-law doctrine on the subject. There is no bill of evidence in the record, but we have the indictment and the instruction before us under which the appellant has been punished in a manner not provided by law.

The **extreme** punishment in this case, if the parties are guilty, can **only** be confinement for twelve months in the state prison, and then **not** for killing the dog, but for intimidating and alarming the owner. Nor is the mere fact that the owner was alarmed or intimidated by the injury inflicted on the dog sufficient; it must appear **that** he was alarmed and intimidated by the defendants, and further **that** they went to his house, not to shoot or injure the dog, but to **alarm** Kellner.

The judgment is *reversed* and cause remanded for further proceedings consistent with this opinion.

L. Farmer, for appellant. J. M. Unthank, for appellee.

W. J. PENDY v. W. J. MORTON.

Husband and Wife.

An agreement of a married woman to pay the debts of her husband is void. Where land belongs to the wife, the husband and wife have the right to sell it, and such an act is not within the provisions of the statute to protect creditors against conveyances made to prefer, etc.

APPEAL FROM SPENCER CIRCUIT COURT.

February 18, 1880.

OPINION BY JUDGE PRYOR:

There is no attempt in this case to charge the married woman with any personal liability, or to make her estate liable for the debt. The testimony showing that she was a feme covert, her agreement to pay is absolutely void. It further appears from the testimony that the land belonged to the wife; if so, the husband and wife had the right to sell and dispose of the land, and such an act is not within the provisions of the statute to protect creditors against conveyances made to prefer, etc. There is no allegation that the land is the husband's and the testimony of Cooper is that the real estate belonged to Mrs. Morton.

The judgment is *reversed* and cause remanded for further proceedings.

E. F. Trabue, Young & Boyle, for appellant.

A. P. Harcourt, for appellee.

ALEXANDER TRIBBLE *v.* W. C. TERRILL, ET AL.

Judicial Sale of Real Estate.

Where a judgment for the sale of real estate is not void but merely erroneous the purchaser at such a sale will acquire title.

APPEAL FROM MADISON COURT OF COMMON PLEAS.

February 18, 1880.

OPINION BY JUDGE COFER:

It is unnecessary to inquire whether the judgment to sell the land is erroneous. Unless it is void the appellant will acquire a valid title and has no right to complain of mere error in the judgment.

This proceeding was under Art. 6, Chap. 63, Gen. Stat., providing for the sale of remainder and contingent interests in land, and not under Art. 3, as counsel seem to suppose.

The land was devised to William C. Terrill for life, with remainder of his children. In such cases Sec. 1, Art. 6, provides that the petition for a sale may be filed by any person having a present interest in the land, and that if the court shall be satisfied that the interests of all concerned would be benefited by such sale it shall adjudge accordingly, "which judgment shall invest the purchaser with all the title of the present and future contingent claimants of said real estate."

Section 2 provides that the proceedings provided for in the first section shall be the same in all respects, as far as necessary, as those provided in Article 4, which relates only to the sale of the lands of infant married women. The only provisions of that article which can possibly apply to a proceeding under Article 6, are those in relation to a bond and the privy examination of feme coverts interested in the land.

In this case there are no feme coverts, and consequently that provision has no application. The provision in regard to a bond does not apply because Sec. 3, Art. 6, requires the proceeds of the land to be invested by the court in other land, and consequently the money will remain in the hands of an officer of court responsible for it on his official bond, until invested, and hence no bond was necessary.

The appellant acquired a valid title and the judgment confirming the sale must be *affirmed*.

Chenault & Bennett, for appellant. W. B. Smith, for appellee.

EMANUEL WILSON v. COMMONWEALTH.

Criminal Law—Evidence.

Evidence having been introduced as to the character of a witness at the trial in a criminal case, at the time of the trial, it is competent to prove by a witness what the character was two or three years prior to the trial.

APPEAL FROM GRAVES CIRCUIT COURT.

February 18, 1880.

OPINION BY JUDGE HINES:

The instructions given covered the whole law of the case, and the refusal to give instruction "A," asked for by counsel for appellant, was properly refused for that reason, and for the additional reason that it attempted to add an element to the offense that is not contemplated by the statute. It is clearly within the power of the legislature to make it a penitentiary offense to unlawfully detain a woman against her will, with the intent to have carnal knowledge with her. This is the offense denounced by the statute, and is the law as given to the jury. The legislature having the constitutional power to pass such a law, and having thus clearly expressed itself, we do not feel authorized to add a new ingredient to the offense as would be done by sanctioning the instruction asked for by the appellant's counsel.

There was no error in admitting the evidence of Col. Crossland as to the character of the principal witness, as known to him some two or three years prior to the time of the trial. Other evidence having been introduced as to the character at the time of the trial, it was competent to show what the character was prior to that time. This question is fully discussed and decided in the case of *Mitchell v. Commonwealth*, 78 Ky. 219.

Judgment affirmed.

Bone & Stanfield, Moorman & Jamison, for appellant.

Hardin, for appellee.

B. C. GREER v. JOHN R. OLDHAM, ET AL.**Vendor's Lien on Sale of Real Estate.**

Where the purchaser of real estate executes his notes to the creditor of the vendor for the purchase-money the vendor's lien is extinguished and not transferred, by operation of law, to the creditors.

APPEAL FROM METCALFE CIRCUIT COURT.

February 18, 1880.

OPINION BY JUDGE PRYOR:

While the petition presents a cause of action, we cannot well see how any lien exists on the land conveyed by Billington to Greer for the note executed to Wilson. Greer owed Billington the purchase-money on a part of it, and in part payment executed his note to Wilson. This extinguished the debt to Billington to that extent, and of course discharged the lien for the same amount.

It was a payment on the land, and in the absence of any proof showing fraud or mistake or some other equitable ground for relief the lien is gone. The case of *McClure v. Harris*, 12 B. Mon. 261, is decisive of this question. In that case the vendee executed his notes to the creditors of the vendor for the purchase-money, and this court said: "The lien was extinguished and not transferred by operation of law to the creditors."

It was also erroneous to render a personal judgment at the time the judgment in rem was entered, for the reason that a final judgment had already been given.

The judgments in personam and in rem are *reversed* and cause remanded for further proceedings consistent with this opinion.

L. McQuown, J. W. Compton, for appellant.

LEWIS SKAGGS v. COMMONWEALTH.**Criminal Law—Impeachment of Witness.**

A witness may be impeached by proving statements made by such witness out of court which are contradictory to those sworn to by the witness in court; but a statement made out of court cannot be proven for such purposes unless the same contradicts the statement made in court.

Self-Defense.

Where after an altercation the deceased went away and was entirely out of danger, and then voluntarily returns with the avowed purpose of renewing the fight, and in attempting to carry out such purpose lost his life by being shot by the accused, the accused's right of self-defense was as perfect as if he had not fired at the deceased in the former encounter. He was at his home, and was not bound to retreat, and if he believed and had reasonable ground to believe that if he stood his ground the deceased would take his life or do him serious bodily harm, he had a right to shoot, and is excusable on the ground of self-defense and apparent necessity.

APPEAL FROM ELLIOTT CIRCUIT COURT.

February 19, 1880.

OPINION BY JUDGE COFER:

The witness, R. L. Rose, was asked if he knew the general character of Martha Skaggs. He answered that he did, and that it was bad,—that she was not worthy of credit on oath.

The regular mode of inquiring into the reputation of a witness is to ask the impeaching witness if he knows the general reputation of the person in question among his neighbors, and what that general reputation is; the inquiry must be as to his general reputation where he is best known, or with those among whom he dwells. *Henderson v. Hayne*, 2 Met. 342.

There is a marked distinction between reputation and character. One is what the person is esteemed to be, the other what he actually is. If I am asked what the reputation of a person is I understand at once that I am not asked to say what I think of him, but what other people think. If asked what his character is I am liable at least to suppose that my own opinion is asked for. And observation has taught every lawyer that witnesses generally, when asked as to the general moral character of another person, understand that their own opinion is being asked for, and if they are at all hostile to the person inquired about they are frequently prompt and even eager to express their own opinions; and not infrequently, when made to understand that it is not their opinions but the opinions of the neighbors and acquaintances generally of the person in question, they are compelled to admit that they do not know, or the fact that they do not is brought out on the cross-examination.

Mrs. Skaggs stated in her testimony before the jury that the appellant told the deceased not to come any nearer, and deceased stepped forward and appellant shot him. The commonwealth was then permitted to prove that she had stated out of court that appellant "dared" the deceased to come further, and when he stepped forward shot him. This was competent. The statement made by her to the jury was material in the defense as showing that the deceased was warned off, and that the appellant acted in self-defense. The statement made by the witness out of court was inconsistent with the affirmative statement in court, and was competent to contradict the witness.

The rule is that when a witness merely fails to prove a fact

beneficial to one of the parties that party cannot contradict him by proof that he made a different statement at another time. *Champ v. Commonwealth*, 2 Met. 17. That would be to make the statement of the witness out of court evidence of a fact he refused to testify to in court. Nor can a witness be contradicted by asking him if a fact does not exist, and if he says "no" proving that he said out of court that it did exist. But the fact testified to by the witness, viz.: that the appellant told the deceased not to come any nearer, was wholly inconsistent with her alleged statement out of court, and proof of this latter statement directly contradicted the statement made by her before the jury.

The evidence for the admission of which *Kennedy v. Commonwealth*, 14 Bush 340, was reversed "did not serve to explain, modify, or contradict anything he (Higgins) had testified to on his direct examination" (page 357), and hence the evidence to prove his statements out of court was held incompetent.

The evidence showed without contradiction that the deceased fired his gun after he passed the house, and that the appellant and his brother fired at deceased and his party. But it also showed that the deceased went beyond the range of the prisoner's fire and was some moments entirely out of sight and out of danger; that the appellant and his brother had ceased firing; that the rencounter was at an end; and, that the parties were separated by a distance probably exceeding one hundred yards. All danger to either party was passed and neither could be hurt by the other unless one or both sought to renew the combat. The evidence was equally uncontradicted that the deceased returned, gun in hand, toward where the appellant was at his home, and cursed and denounced him and invited him out to fight.

His companion, Croft, who appears to have been largely responsible for the loss of the life of the deceased, does not contradict the statements of Kelly and Mrs. Skaggs that deceased invited the appellant out to fight, nor does he deny that he directed the deceased to hold his fire and make a sure shot. Susan Skaggs swore that she heard that remark, and the evidence warrants the conclusion that the appellant heard it also. There was no evidence whatever that the appellant or his brother did anything to bring on this last rencounter, and the instructions 6 and 7 were misleading in so far as they submitted that hypothesis to the jury. That feature of these instructions was calculated to create upon the mind of the jury

the impression that the court was of the opinion that there was some evidence conducing to prove that the appellant or his brother did something to provoke the threatening attitude of the deceased at the time he was shot; or they may have supposed that if the appellant or his brother shot at the deceased as they went away from the house, and that caused the deceased and Croft to return, that was bringing on the combat within the meaning of the court's instruction.

It does not matter that they may have fired at the deceased as he rode away. He went entirely out of danger, and having voluntarily returned with the avowed purpose to renew the fight, the appellant's right of self-defense was as perfect as if he had not fired some moments before. He was at his home and was not bound to retreat, but might stand his ground, and if he believed and had reasonable ground to believe that, if he stood his ground, the deceased would proceed to take his life, or to do him serious bodily harm, he had a right to shoot, and is excusable on the ground of self-defense and apparent necessity.

Adams was permitted to state that he had heard Joseph Skaggs say that he would be bound to swear that he would not believe Mrs. Skaggs on oath. This, though clearly incompetent, does not appear to have been objected to. There was other illegal evidence to which no objections seem to have been made.

For the errors indicated the judgment is *reversed*, and the cause is remanded for further proper proceedings.

J. R. Botts, for appellant. Hardin, for appellee.

REUBEN KILPATRICK v. COMMONWEALTH.

Criminal Law—Trespass.

Where one employed to play for a dance is not paid for his services and takes a violin, intending to keep it only as pay, and makes no effort to conceal it, he is only guilty of trespass and is not guilty of larceny.

APPEAL FROM HARDIN CIRCUIT COURT.

February 19, 1880.

OPINION BY JUDGE PRYOR:

There is proof conducing to show that the appellant was only guilty of a trespass in taking the violin. He had been employed to

play for the dance, and being denied payment for his services, took the violin in discharge of his claim. He made no effort to conceal the taking, or the fact that he had it in possession, until after the charge of larceny was made against him. It seems to us that this phase of the case should have been presented to the jury. If he took it merely as a trespass he is not guilty of larceny.

Judgment *reversed* and cause remanded with directions to award a new trial and for further proceedings.

Montgomery & Marriatt, for appellant.

Hardin, for appellee.

J. DAVIS *v.* T. B. MONTGOMERY, ET AL.

Appeals Only Taken From Final Judgments.

An appeal can only be taken from a final judgment.

Pleadings.

Where allegations are affirmative and set up new and material matter, and no demurrer, answer or reply is filed thereto, such allegations must be taken as confessed.

APPEAL FROM LINCOLN COURT OF COMMON PLEAS.

February 20, 1880.

OPINION BY JUDGE HINES:

The appeal in this case as to Thomas B. Montgomery should be dismissed, because there is no final judgment in his favor from which an appeal will lie. Demurrers were sustained to the petition and amended petition, but subsequent to the judgment sustaining the demurrers, a second amended petition was filed which appears to have never been acted upon, and the judgment rendered in favor of the other appellees does not purport to pass upon the respective rights of appellant and Montgomery.

The judgment quieting the title of appellees, Walter Hays, Charles Carson, Isaac Carson, Anderson Blair, and Wyatt Hill, should be affirmed. In their answer and cross-petition they affirmatively allege that they were the owners and in possession of the land now held by them, at the time and prior to the execution of the mortgage to Spraggins, and that the mortgage did not embrace the land held by them. As to the Montgomery mortgage, they say that at the sale

under which appellant purchased, no portion of the land held and claimed by them was sold or offered to be sold. They say that at the time of the institution of the action by Montgomery and Carson and Spraggins they were the legal owners and lawfully seized of the land held by them, and that they have been ever since and now lawfully seized of said land, and that no attempt was made in the said proceedings to subject any portion of their said land; that the land embraced in the Spraggins mortgage is more than sufficient to pay both mortgage debts. To this pleading there was no demurrer, answer, or reply. The allegations, being affirmative and setting up new and material matter, must be taken as confessed. Without reference to the proof, the judgment of the court below upon the pleadings is correct.

Wherefore the appeal as to Montgomery is *dismissed*, and the judgment as to the other appellees is *affirmed*.

R. C. Warren & W. G. Welch, for appellant.

Hill & Alcorn, for appellees.

DAVID HAMILTON, ET AL., v. W. A. STEWART, RECEIVER.

Sureties on Receiver's Bond.

Sureties on a receiver's bond are not precluded from showing that they are not liable, and that an account and settlement made by the receiver and adjudged to be true is based on moneys received and collected by him prior to the date of the bond on which their names appear; and they may be allowed to show that moneys coming into the receiver's hands since the execution of the bonds by them have been accounted for.

APPEAL FROM DAVIESS CIRCUIT COURT.

February 21, 1880.

OPINION BY JUDGE PRYOR:

The petition alleges that the commissioner, Pegram, was ordered to collect the money, and it is immaterial whether that order was made before or after the execution of the last bond. If he, as receiver, collected the money after these appellants became liable, and failed to pay over, they should answer as his sureties for this default. It is distinctly alleged that in May, 1870, he collected \$4,200 of this money, and has failed to account for it. The only question,

it seems to us, is: Has he paid it over? The judgment against Pegram that purports to be a judgment on a settlement of his accounts as receiver does not preclude the sureties from showing that they are not liable for the amount. If the account is made up of moneys collected prior to the date of the bond on which their names appear, there is no reason why they should not be allowed to show that all the moneys collected by the receiver since the execution of the bonds by them has been accounted for.

They show by the testimony of James Weir that a part of the money collected had been paid to him, not only the \$1,482, but other claims that are set forth in the exhibit filed by the appellants. While Weir does not give the amounts paid to him, the exhibit filed with the answer shows that he received certain other sums, and it is not denied that this was properly paid out; or, if there is such a denial, it is not denied that it was paid on claims and to claimants who were entitled to receive it. There was enough proof in the case to go to the jury on the question of payment, and a peremptory instruction should not have been given. The order directing the institution of an action against the sureties did not require that all should be sued. The receiver had the right to sue as any other litigant, and it seems to us the only defense is: Has the money collected since the date of the bond been accounted for? The judgment against Pegram does not prevent the sureties from establishing that fact. It is manifest that the receiver has made nothing out of the sale of the principal's estate, and we see no reason why the action is not properly brought.

Judgment *reversed* and cause remanded for further proceedings.

Owen & Ellis, William Lindsay, for appellants.

Williams & Brown, R. W. Slack, for appellee.

N. B. DAY v. G. W. SEWELL.

Presiding Officer of the County Court.

The judge is the presiding officer of the county court, when such court is composed of the judge and justices; and when such judge is forced to leave the presiding chair and one of the justices is put up to preside, the action of such court then taken is void and of no effect.

APPEAL FROM BREATHITT CIRCUIT COURT.

February 21, 1880.

OPINION BY JUDGE COFER:

The presiding judge, as his title indicates, is the presiding officer of the county court when composed of the judge and justices, and the action of the justices in compelling Judge Burnett to vacate the chair, and putting one of their own number in his place, and afterward disposing of the substitute in the same manner because he decided contrary to their wishes, was clearly illegal.

Judge Burnett presided on the 22nd day of October, 1878, and the minutes of that day were signed by him. He was present in court on the next day, but was put out of the chair by the illegal action of the justices, and did not sign the minutes of that day, but they were signed by the usurping justice, and have no more effect in law than if they had not been signed at all, and they are therefore void. Sec. 7, Art. 17, Chap. 28, Gen. Stat.

The only valid record, that of the proceedings of Oct. 22, 1878, shows at most that there was a tie vote between the appellant and appellee. The only question in the case was whether the appellee was legally entitled to the office. It is clear that he was not, and when the court had so decided it had disposed of the whole case, and the intimation in the judgment that Esq. Minix was entitled to vote, and that the appellant was not entitled to hold the office beyond the time of the next annual court of claims, was no more than an expression of the opinion of the judge upon a question not before the court. The appellant's rights, whatever they may be, were not affected by that part of the opinion of the court.

Judgment *affirmed* on the original and cross-appeal.

H. C. Lilly, J. & J. W. Rodman, for appellant.

A. J. James, for appellee.

EDWARD G. WESTCOTT v. EDWARD H. MAXWELL, ET AL.

Suit to Set Aside Conveyance of Real Estate.

Where real estate is conveyed by the wife for no other consideration than as a token of her purpose to reform, and after the marital relation and the cause of the husband's shame and mortification are entirely removed, such conveyance will be set aside.

APPEAL FROM KENTON CHANCERY COURT.

February 21, 1880.

OPINION BY JUDGE PRYOR:

The claim of the husband to the property conveyed him by the wife, for no other consideration than as a token of her purpose to reform, does not strike the mind of the chancellor as being altogether meritorious, and particularly after the marital relation has been severed, and the cause of the husband's shame and mortification, conceding his statement to be true, entirely removed. It may be difficult for counsel, by reason of his zeal for his client, to realize the position in which the latter is placed by a defense that both in a legal and moral point of view must determine this case adversely to him.

We can only try this cause upon the record as we find it, and the more the defense is examined the stronger the inclination to annul the conveyances made by the wife of the property in controversy. The only objection really urged by counsel is the language used in the opinion that reflects on the conduct of his client, and while the appellant may be all that is claimed for him by those who know him best, this court must speak alone from the facts developed by the record. Being convinced as to the correctness of the conclusion reached the petition is overruled.

The opinion has been modified by the erasure of certain words that in the opinion of counsel reflect too severely on the appellant.

M. J. Dudley, for appellant.

Stevenson & O'Hara, for appellees.

FRANK WILLIAMS v. SAMUEL B. MERRIFIELD, ET AL.

Appeals.

No appeal lies from an order sustaining a demurrer, unless it is followed by a judgment in its nature final.

APPEAL FROM NELSON CIRCUIT COURT.

February 26, 1880.

OPINION BY JUDGE COFER:

No appeal lies from an order sustaining a demurrer, unless it is followed by a judgment in its nature final. Until such a judgment is rendered this court has no jurisdiction.

Wherefore the appeal is *dismissed*.

John A. Fulton, J. W. Thomas, for appellant.

Muir & Wickliffe, for appellees.

H. S. LYTER v. CITY OF LOUISVILLE.

Improvement Contract.

Where a contract for a public improvement is entered into, but on account of high water not completed within the time agreed upon, but the city permitted its completion after the time when it should have been completed, and received it from the contractor, the city is liable for the contract price.

APPEAL FROM LOUISVILLE CHANCERY COURT.

February 28, 1880.

OPINION BY JUDGE PRYOR:

The specifications defining the nature of the work and made part of the contract provide that no allowance will be made for caving or sliding unless it is caused by some alteration by the city engineer in the depth or width of the trench, and not by the peculiarity of the soil. For any extra work the engineer's estimate of the cost and ten per cent. added is the amount to which the appellant is entitled. By the terms of the contract the appellant undertook to complete the work within ninety days, unless further time should be given him by the city authorities. It was certainly contemplated by all parties when the contract was made that the time for fulfilling it was ample, and but for the prevention of its execution by the sudden or unexpected rise in the river it perhaps would have been completed within the time limited by the contract.

The city, however, permitted its completion after the time had elapsed, and received it, as it now contends under the contract, and there is no reason why appellant should not recover if the city has failed to pay him. Much of the work had been done by appellant within the ninety days, but by reason of the cessation of the work made necessary by the high water there was no labor performed under the contract from November, 1873, until June, 1874; and when the appellant began his work in June he found the trenches filled with sand, the sides or banks of the trenches fallen in, so as to require much labor and a considerable expenditure of means to place the work in the condition it was in November, 1873.

It is insisted that much of this extra labor was caused by permitting the water from Paddy's Run to escape through this sewer so as to drain a large area of ground, and that this constant flow of water caused the banks to cave in and additional excavation necessary.

That this fact contributed to increase the labor and expenditure by appellant we think is established, but that much of the extra labor was caused by the overflow from the river, and the springs that made their appearance within the sewer, and the washings caused by the rains during the winter and spring, is equally certain, and the appellant having received cost for this extra labor and ten per cent. added we cannot well see why he should complain. The extra excavation and other work was not the result of any alteration made by the city or its engineer, but was caused by the washings through and in the sewer, after the work had ceased in the fall of 1873. This made the extra work and extra excavation necessary, and as the misfortune caused by the high water has resulted in loss to both parties, although the city may by its action have increased the amount of labor necessary to its completion, we think the appellant has been fully compensated by the payment to him of the value of his labor and ten per cent. added. If there had been no rise in the river, or the springs had not made their appearance and injured the work within the ninety days, it would have been the duty of the contractor to have still complied with his contract without extra compensation, and when the time for completing the work has expired, and he receives this extra compensation based on the idea that the city contributed to produce the loss, we think he has received all that he is entitled to in this particular. It appears, however, that in the execution of this work the appellant purchased 14,000 feet of dimension lumber at the price of \$65 per thousand, and that the lumber was hauled on the ground to be used in making an apron for the sewer.

The specifications provided for this lumber, and it seems to be useless for any other purpose. The city dispensed of the white oak apron and substituted another, leaving the timber on the ground, and of little, if any, value to the appellant. Although the city had the right to change the work in the mode of its execution, it was too late after the lumber had been hauled upon the ground to say to the appellant we will dispense with the lumber and you, the contractor, are entitled to no compensation. It should have been, and must be regarded (the delivery of this lumber) as a part execution of the work, as much so as if the city had ordered the white oak apron taken up after it had been laid in the trench; and while the change may have been proper, with the right on the part of the city to make the alteration, it must pay the appellant the damages he has sustained. The lumber is the property of the city, and its value should

be accounted for to the appellant. This is \$900 with interest from the filing of the petition. There is no dispute but that the lumber was dispensed with, and that it was left on the grounds; or if not, the testimony is conclusive on this point.

We see nothing in this case authorizing any damages for the appellant other than the value of the lumber. He received upwards of \$4,000 for extra work, and in this sum is included \$864 for sloping banks and opening trench.

The judgment is *reversed* and cause remanded with directions to enter a judgment for the appellant for \$900 with interest from the date of filing this petition.

Russell & Helm, for appellant. T. L. Bennett, for appellee.

CINCINNATI SOUTHERN R. CO. *v.* J. F. MILLER.

Contributory Negligence.

It is not every act of contributory negligence that will prevent one from maintaining an action for an injury received; such negligence will not prevent the plaintiff from recovering, unless but for such negligence the injury would not have occurred, or if the defendant, by the exercise of ordinary care, could have avoided the consequence of plaintiff's negligence.

Instructions.

The court is not required to instruct on an issue not raised by the pleadings, nor on a state of facts not disclosed by the evidence in a given case.

Duty of Railroad Company to Avoid Injury.

The failure of the owner of animals to exercise ordinary care to prevent their injury will not exonerate a railroad company from exercising ordinary care to protect such animals thus endangered.

Evidence.

The provisions of Sec. 5 of Chap. 57 of the Gen. Stat. of Kentucky, providing that the killing or damaging of animals by railroad cars shall be prima facie evidence of negligence, means that such killing, etc., shall be prima facie evidence of that degree of negligence necessary to render the company liable, and that this presumption may be overcome by proving either no negligence or a lower degree than is required to fix liability in the particular case.

APPEAL FROM KENTON CIRCUIT COURT.

March 2, 1880.

OPINION BY JUDGE HINES:

This action was brought under Secs. 4 and 5, Chap. 57. Gen. Stat., to recover the value of a cow killed by an engine drawing a train of freight cars. Those sections are:

Fourth Section: "All railroad companies in this commonwealth shall pay full damages to the owners of horses and other stock they may negligently or carelessly kill or damage, by their cars or agents, along said roads or its branches, within said commonwealth."

Fifth Section: "The killing or damaging of any horses or other stock, by the cars along said roads or branches, shall be prima facie evidence of carelessness and negligence of said company."

Counsel for appellant insist that the law as to contributory negligence was not properly given to the jury. The following is the instruction given on that point:

"If the jury believe from the evidence that the plaintiff, by his own fault or negligence, permitted his cows to wander or stray from his own land and on the track of the road outside of his own farm, and thereby contributed to the injury complained of, then they should find for the defendant, unless they believe that the employes in charge of the train, after discovering her on the track, could, by the exercise of ordinary care, have stopped the train and avoided the injury, etc."

This instruction was given at the instance of appellant, and then counsel for appellant asked the court to tell the jury that, in case of such contributory negligence as indicated in the instruction quoted, there could be no recovery unless the employes in charge of the train were guilty of gross negligence. This the court refused, and complaint is now made that this is grounds for reversal.

It is said in *Sullivan's Adm'r v. Louisville Bridge Co.*, 9 Bush. 81. that it is not every act of contributory negligence that prevents one from maintaining an action for an injury received. Such negligence will not prevent the plaintiff from recovering, unless for this negligence the injury would not have occurred, or if the defendant by the exercise of ordinary care could have avoided the consequence of plaintiff's negligence. The same rule is laid down in *Jacob's Adm'r v. L. & N. R. Co.*, 10 Bush. 263.

Under the statute upon which this action is based the company is made liable for injuries resulting to stock from any degree of negligence on the part of those having the train in charge, and the failure

of the owner of the stock to exercise ordinary care in regard to it by reason of which the danger of loss is increased will not exonerate the company from exercising ordinary care to protect the stock thus endangered. If the stock had been wilfully placed in danger for the purpose, on the part of the owner, of having it destroyed, and but for which the injury would not have resulted, a different rule would apply. But such a case is not presented by the record, and we cannot, therefore, speculate upon cases of criminal neglect or wilful wrong that may arise under the statute, as nothing of that character is set up in the pleadings.

It is also insisted that the court erred in neglecting to instruct the jury as to the law applicable to a state of case arising under Sec. 2, Chap. 57, Gen. Stat. That section reads: "If by the locomotives or cars of a railroad company, cattle or other stock shall be killed or injured on the track of said road adjoining the lands belonging to or in the occupation of the owner of such cattle or stock, who has not received compensation for fencing said land along said road, the loss shall be divided between the railroad company and the owner of such cattle or stock, unless the killing or injury arose from the wilful act, or carelessness, or negligence of the agents or servants of such company, in which case the whole loss shall be paid by such company.

The pleadings as well as the evidence show that the cow was not killed on the track of the road adjoining the lands belonging to the owner of the cow; but even if the evidence showed this fact the pleadings would not authorize the right of recovery to be measured by this section. No issue was tendered or formed as to the ownership or occupancy of the land, or as to whether the injury was inflicted while the cow was on the road adjoining the lands of plaintiff.

Construing these three sections of the statute together the law seems to be that when, by the ordinary negligence of the company, stock is killed on the road adjoining the land of the owner of the stock, who has received no compensation for fencing, the loss must be borne equally by the company and by the owner of the stock; but where the killing under such circumstances is the result of the wilful or gross negligence of the company the owner of the stock is entitled to the full value. If the killing should occur elsewhere than on the road adjoining the land of the owner of the stock the company is liable for ordinary negligence. The provision of the fifth section that the fact of killing shall be *prima facie* evidence of negligence, means simply that it shall be *prima facie* evidence of that degree of

negligence necessary to render the company liable, and that this presumption may be overcome by proving no negligence or a lower degree than is required to fix liability in the particular case.

The evidence was sufficient to support the verdict. There was conflicting evidence as to whether any signal was given by those in charge of the train, and as to whether the train could have been checked in time to prevent the injury, and whatever the weight of the evidence may be the verdict is not flagrantly against it.

Judgment affirmed.

C. B. Simrall, for appellant. Simmons & Schmidt, for appellee.

SALLIE MCGUIRE'S EX'R *v.* J. J. ROBINSON'S ADM'R, ET AL.

Liens on Real Estate.

Notes secured by one lien in the same conveyance have no priority the one over the other. There is no equity in giving one lienholder a preference over another in such a case.

Parties to an Appeal.

An appellant may prosecute his appeal as against one or more of the parties to the record, but if he fails to make the proper parties, the remedy is by motion to dismiss the appeal.

APPEAL FROM GALLATIN CIRCUIT COURT.

March 2, 1880.

OPINION BY JUDGE PRYOR:

The authorities relied on by counsel in support of the view favorable to appellant have not been sanctioned by any adjudication of this court.

The doctrine is that notes secured by one lien in the same conveyance have no priority the one over the other, and in this case, the personal liability of Robinson being gone as assignee of the note, there is no equity in giving one lienholder a preference over another. This doctrine has been repeatedly recognized by this court, and now forms a part of the civil procedure of the state regulating the enforcement of liens. Sec. 694, Civil Code; *Broadwell v. King*, 3 B. Mon. 449; *Burrus v. Roulhac's Adm'r*, 2 Bush 39; *Lewis v. Pusey*, 8 Bush 615. It is only the appellees who can pray a cross-appeal, and then against the appellant. It does not follow that because one is a party to the record below that he becomes a party here. The appel-

lant may see proper to prosecute his appeal as against one or more of the parties to the record, and if he fails to make the proper parties, remedy is by motion to dismiss.

Judgment *affirmed* and cross-appeal dismissed.

J. J. Landrum, Strother & Orr, for appellant.

Hallam & Gordon, Winslows, for appellees.

JAMES J. LONG v. B. F. LONG, ET AL.

Conveyance of Real Estate by Boundary.

Where the contract of sale of real estate is a purchase by the boundary, and the quantity of land is by the vendor and vendee estimated to contain a designated number of acres, not with a view to make the number of acres a matter of importance, the sale is based on the boundary and not upon its estimated area.

APPEAL FROM OWEN CIRCUIT COURT.

March 2, 1880.

OPINION BY JUDGE COFER:

The plaintiff alleged that "the contract was a purchase by the boundary, and the quantity was by the said B. F. and James Long, (vendors) and the defendant, Jas. J. Long (vendee), estimated to contain 66 acres, 3 roods and one pole."

This brings the case within the second class of sales in gross as defined in *Harrison v. Talbot*, 2 Dana 258. The sale is alleged to have been by the boundary, and the quantity, by estimation, was mentioned, if not by way of description, merely incidentally and not with any view to make the number of acres a matter of any importance. The price was fixed in view of the boundary, and not upon an estimate of the number of acres contained in it. The sale was based on the boundary and not upon its estimated area.

Judgment *reversed* and cause remanded with directions to dismiss the petition.

E. E. Settle, for appellant. H. P. Montgomery, for appellees.

H. C. DAVIS v. FRANK RAINS, ET AL.

Novation.

When one person is indebted to another on account and after his death his widow executed to the creditor a due bill for the amount of the debt, antedating it to the time of its creation, it amounts to a complete novation and releases the estate of the debtor.

Conveyance by Married Woman, the Husband not Joining.

A married woman conveys no title by a deed in which her husband does not join.

APPEAL FROM WHITLEY CIRCUIT COURT.

March 2, 1880.

OPINION BY JUDGE HINES:

It appears that in September, 1862, Canada Gains was indebted to Frank Rains in a certain sum of money, due on account, and that after the death of Canada Gains his widow, Rebecca Gains, executed to Rains a due bill for the amount of this debt, antedating it to the time of its creation. This was a complete novation, and certainly, so far as the estate of Canada Gains is concerned, released it. Whether the estate of Rebecca Gains, if any, would be liable we need not consider, as the pleadings present no such question.

The conveyance of the land by Lucinda Perkins to the appellant and his wife gave no title. At the time of the conveyance Mrs. Perkins was a feme covert and could not, therefore, convey whatever title she had without joining with her husband in the conveyance. The personal property set aside to the widow on the death of her husband became hers to do as she pleased, and whether set aside or not the property exempt from distribution became hers.

The possession of Davis and wife, though the deed under which they hold is void, gives them title against all persons but the true owner, and, therefore, such an interest as entitles them to prosecute the appeal.

Judgment *reversed* and cause remanded with directions for further proceedings consistent with this opinion.

R. D. Hill, for appellant. John Smith, for appellees.

C. DUDLEY *v.* J. J. B. HILLIARD, ET AL.

M. C. W. BLACK, ET AL. *v.* SAME.

Names of Parties.

The omission of one of the initials of a defendant's name in a summons is not such a defect as to excuse him from appearing to an action or invalidate the judgment afterward entered.

Effect of Antenuptial Contract.

Where the purpose of an antenuptial contract is to exclude the husband from participation in the wife's property, and when a trustee is appointed thereunder, but by its terms she reserves the right to the entire income from the property, and may direct her trustee to sell and convey her real estate and invest the income or proceeds in other property, to be held by such trustee upon the same terms, and when she has the power under such contract to direct her trustee in every move he is to take, she has all the power over the estate that she would have had if she had remained unmarried, and may mortgage the property to raise money if she so desires.

APPEAL FROM LOUISVILLE CHANCERY COURT.

March 4, 1880.

OPINION BY JUDGE PRYOR:

There is nothing on the face of the record occurring before judgment indicating that the appellant, Mrs. Black, was a married woman at the date of the execution of the notes, or at the institution of the action, and, she having received the money of the appellees and used it for her own purposes, the chancellor would be reluctant to open the case in order that she might avoid the effect of the judgment. The appellees had the right to presume that she was competent to enter into such business transactions, and when, in order to effect a negotiation that enabled her to raise the money, she informed the broker that she had been divorced from her husband, and obtained the loan upon that representation, the chancellor should decline to listen to an application for a new trial for the purpose of affording her any relief, and so far as she is interested the judgment against her must stand.

The appellant had notice of the pendency of the original action, was properly summoned and failed to answer, and, although her full name is not given in the summons on the cross-petition of Graham, the omission of one of the initials of her name does not invalidate the judgment. She was summoned in conjunction with her trustee, and if she had any defense should have answered. Nor is there any reason why the word "days" should not be supplied in the blank found in the mortgage, as such was evidently the plain intent of the instrument, so much so as not to require an averment of a mistake or omission.

The question presented in this case by the purchaser is more difficult of solution. That the principal object in view by Mrs. Black

when entering into the antenuptial contract was to secure to herself the property to the exclusion of the husband is evident; and in the attempt to thus secure it she has provided that in a certain contingency the property is to pass to her children in the manner provided by the agreement. She has the right to the use and enjoyment of the entire income of the estate, and may further direct her trustee in writing to sell and convey this estate and invest the proceeds, to be held on the same trusts herein created; likewise, any property, real or personal, purchased therewith, together with like power to sell and invest, or otherwise dispose of the purchase-money arising from any sales from time to time, etc. She may also at any time invest any income from said property to be held in trust, etc.

In contemplation of this marriage the grantor was executing an instrument under which she could control the principal of her estate through the intervention of a trustee, and also the income as against any claim of the husband and without regard to his marital rights. She could order the real estate sold and reinvestments made under the same trust, with like power to sell and reinvest or otherwise dispose of the purchase-money arising from any sale from time to time. She had all the power over the estate that she would have had if a feme sole, except her action in the present case was through the intervention of a trustee. She could make the trustee sell, require him to reinvest, or otherwise dispose of the money. If she had all this power over it we see no reason why the right to mortgage the property to raise money did not exist. If by the terms of the conveyance or contract she could dispose of the money arising from the proceeds of sale, we see no reason for withholding from her the right to mortgage the real estate to raise the money.

A fair and legitimate construction of the contract vested in Mrs. Black the right to own and control the property and its proceeds independently of her husband as long as she lived, and having secured this right the further purpose was to exclude him from any interest after her death. The right is then reserved to the grantor to dispose of all her estate by last will and testament, and, in the event she makes no will or directs any other disposition of the property, it is to pass to her children in the manner provided by the conveyance. The fact that her children may, upon a certain contingency, take under the conveyance is not consistent with the right of the mother to dispose of the property. The purpose of the wife in entering into the contract is manifest, the whole object being to give her the use, con-

trol and disposition of the property, regardless of her husband, without limitation or restriction, and the trustee is invested with no other right than to act as required by the beneficiary, Mrs. Black.

The power to sell and convey does not necessarily imply the right to mortgage, but on the contrary this right does not exist unless such is the manifest intention of the parties to be gathered from the entire writing. But where one is the absolute owner, whether of general or separate estate, with the power to sell or to direct a sale and invest the proceeds, or otherwise dispose of the purchase-money, we see nothing to prevent the execution of a mortgage, or any other disposition of the property that the parties may see proper. This entire estate, as we construe the conveyance, is at the entire disposal of Mrs. Black. She could use and enjoy the realty, sell or mortgage it, because no one else had any interest in it, and by the express terms of the agreement the husband had no power to control its disposition. The wife did not intend to restrict her right to dispose of this estate or to relinquish any interest whatever in it, either in favor of the trustee or the children. The trustee is invested with the mere naked title, and holds the property subject to be disposed of at the will of the cestui que trust. The manifest object of the conveyance was to exclude the husband, but in no wise to restrict the rights of the wife; and such being the proper and legitimate construction of the conveyance, the judgment must be *affirmed* on both appeals.

Russell & Helm, for Dudley.

P. B. Muir, D. J. Heyman, A. A. Stoll, for Black.

E. W. C. Humphrey, William E. McAfee, for appellees.

GEORGE W. DITZLER, ET AL., v. GEORGE W. SMITHERS, ET AL.

Mental Capacity of Testator.

When mental capacity is the issue tried by a jury, and there is much evidence on both sides and a verdict reached, and on a second trial before the judge the same conclusion is reached, the Court of Appeals will not reverse on the weight of the evidence.

Objection to Deposition.

It is too late to object to the reading of a deposition when not made until after the trial commenced.

APPEAL FROM JEFFERSON COURT OF COMMON PLEAS.

March 4, 1880.

OPINION BY JUDGE PRYOR:

In so far as the proof of the execution of the will in controversy is concerned, it is shown by the testimony of Wilhoit, one of the attesting witnesses, that the paper was attested by himself and Colonel Steele at the same time. The witness, D. M. Rodman, gives, in substance, the testimony of Colonel Steele on the former trial. He is uncertain whether Colonel Steele stated that the deviser made her mark or wrote her name, but he does recollect that Steele stated that he was present and attested the paper in the presence of the deviser and at her instance. This witness gives many of the details of the conversation between Colonel Steele and the deviser as stated by the Colonel on the former trial, and the testimony offered as to the execution of the paper was, in our opinion, all that could have been required.

The only question really involved in the case was as to the mental capacity of the deviser at the date of its execution. On that subject many witnesses have testified pro and con, and on this conflict of testimony the jury had passed by their verdict on a former hearing, and when the present trial was had, the judge selected to try the law and facts has rendered a similar judgment, and this court will not disturb it. It is to be presumed that the judge only considered the testimony that was competent and relevant to the issue. He was fully able to make the proper discernment, and strike from his mind all the testimony that had no bearing on the issue presented, or that was otherwise incompetent. The objection to the reading of the deposition of Emma Brown came too late. It was not made until after the trial commenced, and therefore cannot be considered by this court.

If Rodman's testimony, as to the execution of the will, was out of the case we think the proof of its execution was fully established by the other subscribing witness, who says that Steele and himself attested the paper. That the deviser acknowledged the paper to be her will clearly appears, and, the witness having attested it, the presumption necessarily arises that the signature of the deviser was there at the time or had been signed prior to its attestation.

The judgment below must be *affirmed*.

F. T. Fox, Jr., P. B. Muir, for appellants.

French & Harwood, for appellees.

CITY OF PARIS v. JAMES MCINTYRE.

City Taxes on Agricultural Lands.

Courts cannot declare unconstitutional an act of the legislature extending the boundary of a city upon the mere supposition as to the impolicy of such extension. Before courts will do so there must be shown to be a plain violation of the constitution providing that private property shall not be taken for public purposes without just compensation.

Sufficiency of Petition.

Where a plaintiff seeks to enjoin the collection or levy of taxes by a city on real estate annexed to and within city boundaries, his petition must state facts sufficient to show that the lands are used exclusively for agricultural purposes, and manifest that, from the character of the surrounding population, the property could not receive any benefits from the extension of the city government over it.

APPEAL FROM BOURBON CIRCUIT COURT.

March 4, 1880.

OPINION BY JUDGE HINES:

This action was brought to restrain the collection of a municipal tax, for general purposes, upon a lot within the limits of the city of Paris. The facts, as they appear from the petition, which was taken for confessed on the failure of the appellant to plead further after a demurrer to the petition was overruled, are substantially as follows: Appellee is the owner of an unimproved lot of about three acres, used only for pasturage, which was brought into the city limits by an extension of the city boundary in 1868. The city has made no improvements in the vicinity of the lot since the extension of the boundary, and neither the appellee nor his property derives any benefit from being within the city limits. It is alleged that there was no necessity for bringing the property within the city limits, and that it was brought in for revenue purposes only. The petition does not state what the character of the improvements in the vicinity of his property is, nor whether the city population extends around or beyond his premises. The injunction was made perpetual, and the city appeals.

The courts cannot declare unconstitutional an act of the legislature extending the boundary of a city or town upon the mere supposition as to the impolicy of such extension; nor should the motives of the extension enter into the consideration of the court in passing

upon such questions. There should be a plain and palpable violation of the constitution, that private property shall not be taken for public use without just compensation, before the courts should interdict the operation of the law. Cases have frequently arisen in which the courts of this state have restrained the collection of taxes for municipal purposes on lands used exclusively for agricultural purposes, when it was manifest from the character of the surrounding population that the property did not and could not receive any benefit from the extension of the city government over it; but in all such cases the rulings are necessarily based upon the constitutional provision that the levy and collection of taxes for general municipal purposes amount to taking private property for public use without compensation. Such a case is not presented by this record.

Wherefore the judgment is *reversed* and cause remanded with directions for further proceedings consistent with this opinion.

Chas. Offutt, for appellant. G. C. Lockhart, for appellee.

ANDREW WHITE *v.* G. W. MCKINLEY, ET AL.

Surety on an Appeal Bond.

When a surety on an appeal bond covenanted to satisfy and perform the judgment in case it should be affirmed on the appeal, and the particular appeal was dismissed and the judgment appealed from was affirmed on a subsequent appeal, it was held that such security was liable, as the dismissal of the appeal constituted a virtual affirmance of the judgment.

APPEAL FROM MARION CIRCUIT COURT.

March 4, 1880.

OPINION BY JUDGE COFER:

The surety in the appeal bond covenanted to satisfy and perform the judgment in case it should be affirmed on the appeal. That particular appeal was dismissed and the judgment was affirmed on a subsequent appeal.

In *Harrison v. Bank of Kentucky*, 3 J. J. Marsh. 376, the bond sued on was conditioned to pay, etc., "in case said judgment shall be affirmed in said Court of Appeals." The appeal was dismissed for want of prosecution, and in an action on the bond this court held the dismission was a virtual affirmance and sustained a judgment against the sureties.

What the effect would have been in this case if the judgment had been reversed on the second appeal we need not inquire. But the judgment having been affirmed the case *supra* must be deemed conclusive of this case.

Judgment *reversed* and cause remanded with directions to sustain the demurrer to the answer.

Russell & Arritt, for appellant. Belden & Shuck, for appellees.

JAMES LONG, JR., v. C. B. BURKHAM, ET AL.

Surety on Bond for Judicial Sale of Real Estate.

A surety on a sale bond executed for the price of land sold at judicial sale is bound for the whole sum due on the bond, and where on default the land for which the bond was given failed to sell for enough to satisfy the bond he is required to pay the balance.

APPEAL FROM OWEN CIRCUIT COURT.

March 4, 1880.

OPINION BY JUDGE COFER:

The case shows that the appellant became surety on certain sale bonds executed for the price of land sold at judicial sale. Executions were issued on the bonds first falling due, and were returned *nulla bona*. The plaintiffs, to whom the bonds were payable, made a motion based on the returns to resell the property to pay the purchase-money, and Page & Co., having a lien on the land subordinate to the lien of the obligors in the bonds, brought suit to enforce their lien and caused their suit to be consolidated with the suits in which the first sale was made.

The court adjudged a sale of the land to satisfy, first, the sale bonds, and then the debt of Page & Co. The appellee, who was the owner of the debts due on the sale bonds, bought the whole land for less than what was due on the bonds, and the execution enjoined was for the balance not satisfied by the sale. We are unable to see of what the appellant can justly complain.

He was bound for the whole sum due on the bonds. The land for which the bonds were given failed to sell for enough to satisfy them, and he is called upon to pay the balance. This is no more than he is legally bound to do, and the judgment must be *affirmed*.

Green & Lindsay, E. E. Settle, for appellant.

H. P. Montgomery, for appellees.

P. B. GARVIN, ET AL., *v.* J. A. SMITH.**Ground for Attachment.**

It is a good ground for the issuing of an attachment against property of a defendant not exempt from execution, where plaintiff alleges "that from the delay arising from obtaining judgment and return of no property found the collection of his debt will be endangered, and the defendant has not property enough in this state, subject to execution, to satisfy the plaintiff's demand."

APPEAL FROM HART CIRCUIT COURT.

March 4, 1880.

OPINION BY JUDGE COFER:

In his amended petition Garvin alleged "that from the delay arising from obtaining judgment and return of no property found the collection of his debt will be endangered, and the defendant has *not* property enough in this state, subject to execution, to satisfy the plaintiff's demand."

This is, under the code, a separate ground for attachment, and, as held in a recent case, authorizes an attachment against any property of the defendant not exempt from execution. *Burdett v. Phillips*, 78 Ky. 246. This ground was not controverted, and the attachment should have been sustained.

Whether the appellee was a housekeeper is a question that was not raised upon the motion to discharge the attachment, and we need not consider that question here. It might, perhaps, have been raised by a motion to vacate the levy upon such of the property as was claimed to be exempt, but this is doubtful, as that would be a question upon which either party would be entitled to a trial by jury.

The order discharging Garvin's attachment must be reversed, and the cause remanded with directions to sustain the attachment. The amount of the debt of Craddock & Brother is less than \$50, and this court has no jurisdiction to reverse the order discharging their attachment.

Judgment *reversed* on the appeal of Garvin and the appeal of Craddock & Brother is dismissed.

Dawson & Martin, for appellants. S. M. Peyton, for appellee.

C. VANDERGRIFF'S HEIRS *v.* CHARLES L. SCOTT.**Power and Duty of a Receiver.**

A receiver has no right to apply the rent to repairing the premises in his possession without first obtaining the direction of the court to do so, and he cannot make a valid agreement with the tenant to allow the costs of repairs to be set off against the rent without authority from the court whose receiver he is.

APPEAL FROM HENRY CIRCUIT COURT.

March 6, 1880.

OPINION BY JUDGE COFER:

The receiver had no right to apply the rent or any part of it to repairing the premises in his possession, without first obtaining the direction of the court, and his agreement with Vandergriff to allow the cost of repairs to be set off against the rent or to credit it on the rent bonds was unauthorized, and the receiver should not be made liable for the rent unless it shall be lost in consequence of the delay in collecting it produced by his unauthorized act. But as the judgment on the rule would be a bar to future proceedings against him in case such proceedings should become necessary the judgment is *reversed* and the cause remanded with directions to dismiss the rule without prejudice.

J. Barbour, W. B. Moody, for appellants.

Harwood & Carroll, for appellee.

WILLIAM A. ROSE *v.* JAMES TAYLOR'S EX'R.**Judicial Sale of Real Estate.**

Where an appeal is pending from the Common Pleas Court directing a tract of land to be sold to pay a debt, and the judgment was not superseded, and within a month the land is sold and report of sale made some months thereafter, no exceptions having been filed thereto or objections of any kind made; where it was confirmed and a deed ordered made, presented to the court and certified for record, and possession awarded to the purchaser, without any objections being made by any one, and without any information being given to the court of a pending appeal, the party appealing by reason of his negligence cannot successfully attack such sale and have it set aside.

APPEAL FROM MERCER COURT OF COMMON PLEAS.

March 6, 1880.

OPINION BY JUDGE COFER:

In October, 1878, the appellant filed in this court an appeal from the judgment of the common pleas court of Mercer County directing a tract of land to be sold to pay a debt due to the executor of James Taylor.

The judgment was not superseded, and in November, 1878, the commissioner sold the land. He lodged his report of the sale in the clerk's office, January 29, 1879, and on the 3d of February it was filed in court. On the 5th of February, there being no exceptions thereto, the report was confirmed and a deed ordered to be made to the purchaser. On the 11th a deed was presented to the court and examined and ordered to be certified to the proper office for record. On the 12th a writ of possession was awarded the purchaser.

The appellant not only failed to file exceptions to the report of sale or to make any objections to the order directing a deed to be made, the order approving the deed or the order awarding a writ of possession, but he failed to except to any of these orders, as far as appears, to give to the court the slightest intimation that he objected to anything that was being done, or that an appeal from the order of sale was pending in this court. Nor did he afterward move the court to set any of these orders aside.

Counsel now complains that 131 acres of land for which his client agreed to pay \$35 per acre, on which he has paid \$800 and made improvements worth \$1,000, and which was valued at \$20 per acre by appraisers appointed under the Act of 1878, has been purchased by the executor of the vendor at \$5 per acre, and insists that it was the duty of the court below to set aside the sale without exceptions, or, as far as appears, even a suggestion by any one that the sale was for an inadequate price, or that the appellant desired to have it set aside; and counsel now asks this court to reverse the order confirming the sale on the ground that the price was grossly inadequate. It is true he urges the additional ground that the order confirming the report was made on the same day the report was filed, and that no time was allowed to file exceptions. But, as we have already stated, the record shows the report was filed in court on the 3d and not confirmed until the 5th day of February. The present code does not prescribe the time that such reports shall lie over for exceptions, and we are not prepared to decide that the time allotted in this case was not sufficient.

Nor can we concur with counsel that it was the duty of the court masked to set aside the sale. It is not the practice and not the duty of the courts to take up each report of sale, scrutinize it, compare it with the record, and see that it is such a sale as should be confirmed. Those are the duties of the parties or their counsel, and when no objection is made the court has a right to presume that the report ought to be confirmed, and that the parties do not desire to have the sale set aside, or that they have no sufficient grounds upon which to ask that it be set aside.

If the appellant has suffered loss it is the result of his own negligence, and we have no power to relieve him. If he had filed exceptions and suggested to the court that an appeal from the order of sale was pending, it would have been the duty of the court to suspend action upon the report until the appeal was decided, or, if the exceptions were well taken, to sustain them and set aside the sale.

None of the cases cited by counsel conflict in any way with the conclusion reached above, that it was not the duty of the court, without exceptions, to look into the report and the record and to set aside the sale, however grossly inadequate the price may have been.

The first case cited (*Bolware v. Bolware*, 4 Litt. 256) was a suit to adjust accounts between partners. A commissioner's report of settlement was filed and the court on final hearing quashed the report and dismissed the bill; and this court held such action correct, although there were no exceptions, because the report was on its face vague and uncertain, and because it appeared that the defendants were about to file exceptions and were prevented from doing so by the court, "who decided that it would hear and determine the validity of the objections to the report on the hearing of the case."

In *Miller v. Hall*, 1 Bush 229, the sale was set aside, but certainly not without motion or objection by the parties interested. In *Clarey v. Marshall*, 4 Dana 99, there was no sale or report by a commissioner, and the case has no bearing upon the case in hand. Nor has *Debell v. Foxworthy's Heirs*, 9 B. Mon. 228, nor *Clark v. Farrow*, 10 B. Mon. 446.

The Act of 1878 (1 Acts 122) provides (section 3) that when the right of redemption exists the defendant shall remain in possession, and that the land shall not be conveyed until the time of redemption expires. The court had no right to presume that the right of *emption* did not exist, and was bound to investigate that question before

ordering a conveyance or a writ of possession, and, as the order for the writ of possession is a final order, it and the order directing a deed to be made must be *reversed*, and the cause is remanded with directions to cancel the deed.

E. J. Polk, for appellant. O. S. Poston, for appellee.

R. T. CARMACK *v.* CHECK & DENT.

Validity of Mortgage.

Where the terms of a mortgage are plain and unmistakable, and the signature of the mortgagor and her acknowledgment are unquestioned, it is conclusive, and will not be varied because the mortgagor believed that the agreement was other than that plainly recited in the mortgage.

APPEAL FROM LOUISVILLE CHANCERY COURT.

March 6, 1880.

OPINION BY JUDGE PRYOR:

The evidence conducing to establish the fraudulent representations in reference to the liability of appellant is not sufficient to invalidate the mortgage or to reform that instrument. The language of the mortgage is plain and unmistakable, and with the signature of the appellant thereto and her acknowledgment before the clerk it must be regarded as conclusive. It is true the mortgagors all say after the condition has been broken that they did not understand it, and the agreement was other than that plainly recited in the instrument, and furthermore that the clerk failed to read and explain it; still, it would be exceedingly dangerous to permit agreements reduced to writing, acknowledged and recorded to be nullified by this sort of proof, and no such precedent should be established.

There is no doubt but that Mrs. Carmack thought her property was liable for only one-half, Mrs. Elkton having mortgaged her property also to secure the same debt, and such would have been the result if the property mortgaged by Elkton could have contributed to the payment. Mrs. Elkton's property was to be equally liable with the appellants,—so the appellant says she understood it, and no doubt such was the agreement. It is true the appellant explains and says that her property was only to be liable for one-half, and this is what she meant by being equally liable; yet it is evident that this qualify-

ng answer was more the result of the manner in which the question was asked, than the knowledge the witness had of the transaction; but whether so or not the proof is not sufficient to authorize the chancellor to disturb the mortgage.

Judgment *affirmed*.

SimcraU & Bodley, for appellants. T. B. Fairleigh, for appellees.

NORCISSA BEVERLY v. J. P. GARVEY & Co., ET AL.

Sale of Real Estate.

When a contract of sale of real estate is made, and some time thereafter a conveyance is made under its terms, and a part of the purchase-money paid, one attacking such conveyance on the ground that it was made in contemplation of insolvency and to prefer, the grantee must show that the grantor contemplated insolvency at the time he sold the real state, and not when he made the conveyance.

APPEAL FROM OLIVER CIRCUIT COURT.

March 6, 1880.

OPINION BY JUDGE COFER:

The plaintiffs allege that on or about the 15th of March, 1879, Crouch, being indebted and in contemplation of insolvency, &c., conveyed a tract of land to Mrs. Beverly. She alleges and the evidence shows that she purchased the land, and paid \$853 of the purchase-money, and the balance by a credit on her father's indebtedness to her, in May, 1879, and that he gave her a bond for title in the August following. The conveyance referred to in the petition was made in execution of this prior contract. That contract is not assailed. It is nowhere alleged that Crouch then contemplated insolvency. There is nothing upon which to base a judgment that he had any expectation, when he sold the land to the appellant, that he would become insolvent; and it is clear that the fact that he may have contemplated insolvency when he made the deed cannot affect her title unless he also contemplated insolvency when he made the contract to convey.

We are, therefore, of the opinion that the court erred in adjudging the conveyance to the appellant to be within the statute.

Judgment *reversed* and cause remanded with directions to dismiss the petition as to her.

Greene & Lindsay, D. W. Lindsay, for appellant.

H. P. Montgomery, for appellees.

JAMES R. WILMOT'S EX'R *v.* J. S. HAYDEN, ET AL.**Liability of Assignor.**

Where a creditor has instituted his action and recovered a judgment as soon as a judgment could have been obtained, and the administrator of the debtor having been removed before an execution could issue, it became the duty of the assignor to take steps to save himself from liability, and it was not incumbent upon the plaintiff to administer or cause some one else to do so; and where after a public administrator was appointed plaintiff was enjoined from proceeding to collect, he used necessary diligence and the assignor is liable.

APPEAL FROM WAYNE CIRCUIT COURT.

March 9, 1880.

OPINION BY JUDGE PRYOR:

The appellees have exhausted all the means afforded them by law to collect the debt upon which the assignor has been made liable. He instituted his action and recovered a judgment as soon as a judgment could have been obtained, and, the administrator of Worden having been removed before an execution could issue, it was the duty of the assignor to take steps to save himself from liability, and not incumbent upon the appellees to administer or cause some one else to do so. As soon as a public administrator was appointed the appellees took steps to make their debt, and was prevented by an injunction from proceeding at law or equity until Worden's estate was settled. This settlement did not occur until a few years prior to the institution of the present action, and, the appellees having used all the diligence required in the prosecution of their action, the statute did not commence running until the extent of the liability of the assignor was ascertained. It is alleged that a final distribution of the assets of Worden's estate has been made, and this is not denied by the reply of the appellant. From the date of this final payment to Worden's creditors, the statute began to run against the appellees, and not at an earlier date, so the statute presented no obstacle to the recovery on the set-off pleaded.

Judgment *affirmed*.

Morrow & Newell, for appellant. M. C. Saufley, for appellees.

HENRY WATTS, ET AL., v. G. W. LINGENFELTON.

Punitive Damages for Assault and Battery.

Where an attack is premeditated and is an aggravated case of an assault and battery, even when no serious bodily harm results, punitive damages are recoverable.

Defendant Failing to Produce Witness.

When the evidence against a defendant in a suit for damages for an assault and battery is circumstantial, and he has it in his power to produce a witness who might explain the facts, the inference arising from his failure to do so may be properly deduced by the jury.

APPEAL FROM LINCOLN COURT OF COMMON PLEAS.

March 10, 1880.

OPINION BY JUDGE PRYOR:

It is manifest from the proof in this record that the absence of the boy Edwards was properly attributed to the action of these defendants, and the remark made by the judge during the progress of the trial, in order to procure the presence of the witness, was for the purpose of having a full and proper investigation of the case that the jury might have a complete knowledge of all the facts upon which the complaint of the appellee is based. As to Henry and John Watts the testimony is conclusive. The attack made by them on the appellee was premeditated, and a more aggravated case of an assault and battery could not have been established by human testimony. While the consequences resulting from the force used did not seriously affect the mental or physical condition of the appellee, the purpose and intent of the parties was to take his life, if necessary, in order to avenge the wrong supposed to have been committed by a son of the appellee in dogging the hogs of appellants. It is a case demanding punitive damages, and one in which the discretion of the jury should not have been checked, if within the sum claimed by the appellee. That these young men, neighbors of the appellee, armed themselves with pistols and a shotgun with a view of chastising the latter, and to take his life if he resented the indignity, is clearly established, and their conduct is not to be justified or excused, nor the punishment mitigated, for the reason only of the failure of the parties to accomplish their purpose.

The administration of justice for the invasion of a personal or private right would be a mere mockery if defense could be made,

or the damages mitigated in a civil action like this merely because the accused failed to execute fully his criminal intent. The appellee was attacked on the highway leading to his own house by these appellants with gun and pistols, and required to answer for an imaginary wrong alleged to have been committed by a mere boy, the son of the appellee. Such conduct cannot be justified nor excused, nor the verdict of the jury interfered with, unless influenced by passion or prejudice. The enormity of the offense fully vindicates the action of the jury, and a verdict for the full amount claimed would not have been disturbed.

As to Granville Watts the evidence was entirely circumstantial, and although he has sworn and stated he never had any connection with or knowledge of the assault, it was within his power to have shown how and from whom the boy Edwards obtained the gun, and thereby have removed not only the effect of the testimony against him, but all suspicion even of being instrumental in causing this inhuman assault on the appellee. This he has failed to do, and the only question for this court to determine is: Was there evidence sufficient to authorize the finding against him?

He was tried by a jury of his neighbors who knew him and all the parties to this action, and was examined as a witness in his own behalf; and it was within the province of these twelve men selected to try his case, whether or not his statements were to be believed. The shotgun with which the appellee was knocked down by Henry Watts was the property of Granville. A short time prior to the difficulty on the highway, Henry and Granville were at the home of the latter (both being together) and not one word passed between them. Henry looked excited, ate nothing and left the house. In a short time Granville left and is heard making inquiry for the boys. He is seen, according to Bray's testimony, in an open field where he had a full view of the highway and of appellant's wagon. Not long after, he returned home, or in that direction, and the boy Edwards is seen in a short time coming from the direction of his house with this shotgun and delivers it to the parties. Henry Watts swears that he did not see Edwards when at the house, and so could not have required him to bring the gun or have notified him that he needed it; still, Edwards reaches the highway just in time to furnish the appellants with the necessary weapon.

Now it is argued that Henry may have been making false statements, for the reason that Granville has sworn that he did not see

Edwards, or authorize him to carry the gun to the boys, and only left the house in search of them for fear they might do some wrong on account of the hogs being dogged. The jury had the right to accept Henry's testimony as true, or to reject the statements of both, and when Granville knew the character of proof against him, and had it within his power to have produced the boy Edwards and established by him (if the facts existed) his entire innocence of any complicity in the transaction, and failed to do so, it certainly damaged his defense and strengthened the conviction of the jury as to his guilt.

The circumstances against him were not only suspicious, but were sufficient to authorize the finding, and when failing to avail himself of the testimony of this boy by whom the whole matter could have been explained, when it was in his power to produce him, it removed any doubt the jury might have had on the subject. After an order for the arrest of the boy had been made and his presence desired by the appellee, and while the trial was progressing, this boy was at appellant's (Granville's) house every night, as the latter swears, and still no effort made by the appellant to produce him. The witness was only fifteen years old, was in the custody of the appellant, and his failure to produce him must and should have had its effect on both the judge and jury. The testimony of the sheriff as to his efforts to find him were neither incompetent or prejudicial to the appellants. That the boy lived with appellant is a fact conceded, and if appellant saw proper to risk the consequences of the trial without him, upon a state of fact showing that the absence was agreeable, if not procured by the appellants, the fault must rest upon him alone, and not on the court or jury.

The instructions were proper and gave to the jury the whole law of the case.

Judgment *affirmed*.

R. C. Warren, F. F. Babbitt, Dunlap & Dunlap, R. M. & W. O. Bradley, for appellants. Welsh & Saufley, for appellee.

JOHN SIMPSON *v.* JOSHUA A. COONS, ET AL.**Agency of Husband for His Wife.**

Where a wife entitled to dower in real estate sought to be sold authorizes her husband to employ an attorney, and he does so and an answer is filed for her, claiming an interest in the real estate but consenting to its sale, and offering to take her interest out of the purchase-money, and where no fraud or bad faith is practiced by her husband or attorney, she is bound by such answer whether she knew what was in it or not, and a sale of such real estate is valid and binding on her.

APPEAL FROM FAYETTE COURT OF COMMON PLEAS.

March 10, 1880.

OPINION BY JUDGE HINES:

The question is whether Mrs. Amanda Coons has any dower interest in the land purchased by appellant.

A joint answer and cross-petition of Amanda Coons and her husband, J. A. Coons, appears in the record, sworn to by J. A. Coons. Among the allegations of the answer and cross-petition is the following: "Defendants state that said Amanda Coons is the owner of four-ninths of said tract of land, having paid four-ninths of the purchase-money therefor, and she is willing that said land be sold by judgment of the court, but she asks that four-ninths of the proceeds of the sale be adjudged to her for her sole and separate use, and that her dower be allotted to her in the same way."

W. S. Darnaby states, in substance, that he was employed by J. A. Coons to prepare the pleading mentioned, asserting the claim of Amanda Coons, and that he prepared the answer as directed; that the words "and that her dower be allotted to her in cash to be settled in the same way" appear to be interlined in the handwriting of Mr. Smith, to whom the paper was delivered by J. A. Coons. He acted in good faith, believing he had authority to represent Amanda Coons, and did not know until some time after that Mrs. Coons objected to that portion of the answer expressing her willingness to take the value of her contingent right of dower in money.

Mr. Smith states that he was first employed for J. A. Coons and his wife, Amanda, by J. A. Coons himself, who brought to him the answer prepared by Mr. Darnaby; that J. A. Coons authorized him as attorney for his wife to file the answer, but that he never had any direct order from Amanda Coons to represent her.

The bill of exceptions states the testimony of Mrs. Coons as follows: "Mrs. Amanda Coons, being introduced as a witness in behalf of said Simpson, testified that she was ignorant of the contents and nature of the answer filed for her in this case until after the sale of the land to Simpson; that she knew her husband had spoken to Mr. W. S. Darnaby to look after his own interest and hers in the settlement of his estate, but that she had not, at the time of the sale, ever seen or heard anything of the answer filed for her in this case, and did not even know that any answer had been filed; that she had never heard of any employment of Mr. J. S. Smith as attorney for herself or her husband, until after the sale; that she has never been willing and is not now willing that her husband's land should be sold free from her claim for contingent right of dower, unless the amount to be paid her in lieu of said dower claim be fixed beforehand, and she still asserts and claims a contingent right of dower in the land."

It will be observed, from the uncontradicted statements of Mr. Darnaby and Mr. Smith, that Mr. Coons, for himself and for his wife, sanctioned and approved the manner in which the claims of Mrs. Coons were presented in the answer and cross-petition. From the statement of Mrs. Coons it is seen that the authority of her husband to represent her is affirmatively declared, and that she now sanctions all of his acts in the premises except the statement made in the answer that she is willing that the sale of the land be made, and take the estimated value of her contingent right of dower out of the proceeds of sale, insisting that the amount should have been ascertained before the sale. She left the manner in which her claims were to be asserted entirely to the judgment and discretion of her husband, without any restriction whatever as to the method of its exercise. She did not nor does she now say that her husband, through the attorney, had no authority to bind her by such an admission. The power to employ the attorney to represent her interest is conceded, and the fact that she did not know, until after the sale, the character of the answer, is immaterial. She was in court by her attorney, who in good faith represented her interest. No fraud, misrepresentation or concealment is intimated, and she must, since expenses have been incurred and rights have accrued under the employment, be conclusively presumed to have known and sanctioned what her agent and attorney did in the case. Any other rule would seriously interfere with judicial sales. The court could not safely

proceed, nor could one safely purchase under a decree unless it was first shown that the feme covert was in court in person consenting to the decree.

We think that the evidence shows a solemn declaration, on the part of Mrs. Coons, in court, not to relinquish her potential right of dower, but to accept its money equivalent out of the proceeds of the sale, and it would be a fraud upon the creditors of the estate to permit her to retract the consent thus given. Mrs. Coons has no more right to repudiate this consent than she would to claim dower in the land in case she had been present at the sale and announced that she had relinquished dower. To permit a recovery in either case would be to permit her to take advantage of her own wrong. *Craddock v. Tyler*, 3 Bush 360.

In the case of *Connolly v. Branstler*, 3 Bush 702, opinion by Judge Robertson, the wife authorized the salesman to announce that she would not claim dower in the land. Under this announcement the land was sold, and she subsequently brought an action to recover dower. The court said: "Although her declaration to the bidders did not legally alienate her dower, yet, the sale being made on the faith of it, she is equitably estopped from asserting dower against the purchaser, for the disability of coverture could not exonerate her from fraud."

Judgment affirmed.

H. M. Buford, for appellant.

George W. Darnall, Houston & Mulligan, for appellees.

SHELT CHAMBERS v. COMMONWEALTH.

Plea of Former Acquittal.

Evidence of a former acquittal in a criminal case is inadmissible where the plea of former acquittal had not been properly entered, the only record of such a plea being "This day came the defendant and entered a plea of not guilty and former acquittal."

APPEAL FROM MADISON CIRCUIT COURT.

March 10, 1880.

OPINION BY JUDGE HINES:

The judgment of the court below was reversed upon the supposition that the plea of former acquittal had been properly entered; but

our attention is called to the fact that the only record evidence of such a plea is the following order: "This day came the defendant and entered a plea of not guilty and former acquittal." This is not sufficient, under Sec. 164 of the Criminal Code, to authorize the introduction of evidence to establish the fact of a former acquittal. A plea properly entered and sustained by evidence would entitle appellant, under the authority of *Commonwealth v. Bright*, 78 Ky. 238, to a reversal, but in the absence of a plea the evidence is incompetent and the judgment must be *affirmed*.

W. B. Smith, for appellant. Hardin, for appellee.

J. H. KELLAR v. CITY OF LOUISVILLE.

Damages Against City for Injury Caused by Defective Bridge.

Where the city has not improved the street nor invited the public to use it, the bridge being a private structure upon private property and was used by plaintiff without any fault of the city, and nothing was shown which made it the duty of the city to improve it, the city is not liable for injury sustained by the plaintiff in attempting to cross it, even though before that time the city employes replaced such bridge when it was washed away.

APPEAL FROM JEFFERSON CIRCUIT COURT.

March 12, 1880.

OPINION BY JUDGE COFER:

The bridge at which the appellant was hurt was entirely outside of the street. The city has never undertaken to improve the street at or near the ditch crossed by the bridge, and the evidence was not sufficient to show or authorize the jury to find that the public convenience required it to be improved.

If the city had improved the street and thus invited the public to travel along it, and had provided no other means of crossing the ditch, such action would have been an invitation to the public to use the bridge outside of the street, and it would have been immaterial that the bridge was not in the street and was not erected by the city. But as the city had not improved the street nor invited the public to use it, and nothing was shown which made it the plain duty of the city to improve it, we think the city is not liable simply because employes of the city may have replaced the bridge when washed

away. It was a private structure upon private property, and was used by the appellant without any fault on the part of the city.

The case differs from that of *Erie City v. Schwingle*, 22 Pa. St. 384. In that case it appeared that Eighth street had been improved and a bridge erected over the street by the city. The bridge was washed away and the city left the street open, invited the plaintiff into it by not closing it up, and by allowing it to be used without objection, and by putting certain repairs upon it which made it not safe, but passable with skillful driving and good luck.

As we have said, the city never undertook to improve Clinton street; it did not invite the public to travel it, and it did not put the bridge over the ditch; whereas in the Pennsylvania case the city not only improved and opened the street for travel, but when the bridge was washed away the city put certain repairs upon it, or near it, to enable the public to cross the creek, and because those repairs were insufficient the city was held liable.

There was no sufficient evidence tending to establish the liability of the city to authorize the jury to find for the plaintiff, and the judgment must be *affirmed*.

Edwards & Seymour, for appellant. T. L. Bennett, for appellee.

ROBERT HOWE *v.* J. G. ARNOLD'S ADM'R.

Judicial Sale of Real Estate.

Where the sale of real estate has been confirmed the contract is treated as executed, and no mere contingent incumbrances, such as potential right of dower, can be set up as a defense against the payment of the purchase-money.

Excess or Deficiency in Acreage Sold at Judicial Sale.

A purchaser at judicial sale is liable for an excess in the land purchased, but the owner of land sold at judicial sale, not being the vendor, is not liable for a deficit; and for the same reason a creditor for whose debt such land is sold is not liable. In such cases the court is the vendor, and unless the deficiency be such as to authorize the court to set it aside, there appears no ground upon which a purchaser can be relieved on account of a mere deficit, when the land sells for no more than the debt.

APPEAL FROM KENTON CHANCERY COURT.

March 13, 1880.

OPINION BY JUDGE COFER:

the great mass of frivolous excuses set up by the appellant in responses, we have been unable to find more than two that are plausible.

They are: 1st, That Mrs. Morris has a contingent right of dower in the land; 2d, That the land was sold as containing 32 acres of 78 poles, when it in fact contains but $28\frac{1}{4}$ acres.

The sale having been confirmed, the contract is to be treated as absolute, and no mere contingent incumbrances, such as potential dower, can be set up as a defense against the payment of purchase-money. It was decided in *Dawson v. Goodwin*, 15 B. 439, that a purchaser at judicial sale is liable for an excess in land purchased in the same manner as the purchaser at a private sale, but even in that case the court says that the owner of land at judicial sale, not being the vendor, is not liable for a deficit, and it seems to us that for the same reason the creditor for whose debt the land is sold is not liable. In such cases the court is the vendor; the sale satisfies the debt in whole or in part, and unless the deficiency be such as to authorize the court to set aside the sale, we are unable to see any legal or equitable ground upon which a purchaser can be relieved on account of a mere deficit in the quantity, when the land sells for no more than the debt to satisfy which it was

the judgment must therefore be *affirmed*.

W. Cleary and W. P. D. Bush, for appellant.

Ask & Fisk, for appellee.

LEWIS LENTY v. JOSHUA B. PARKS.

Elements Required in Petition for Slander.

A petition for damages on account of slander, to be sufficient, must aver that the false words spoken were maliciously spoken of and concerning the plaintiff.

Slandrous Words.

To say of another that "I will have Parks indicted for forgery by the grand jury" is a cause of action for slander, as the words carry with them a charge of a criminal nature.

APPEAL FROM JEFFERSON COURT OF COMMON PLEAS.

March 18, 1880.

OPINION BY JUDGE PRYOR:

This was an action of slander instituted by Parks against Lenty. and containing three counts.

In the first count it is alleged that the appellant in the presence and hearing of divers persons, spoke of and concerning the appellee the following false, defamatory and slanderous words, to wit: "That Josh Parks, meaning plaintiff, had forged that letter, meaning the letter aforesaid, which he, meaning the plaintiff, had filed with his, meaning plaintiff, motion for a new trial (meaning plaintiff's motion in suit No. 30,421 as aforesaid), thereby meaning that the plaintiff had committed the crime of forgery."

The second count contains in substance the same allegation. In the third count it is alleged that the appellant, in the presence and hearing of divers good persons, spoke of the plaintiff these false, defamatory and slanderous words: "I, meaning defendant, intend to have Josh Parks, meaning plaintiff, indicted for forgery before the grand jury, meaning the grand jury of Jefferson county."

Each count in the petition is fatally defective in failing to allege that the words were maliciously spoken of and concerning the plaintiff, and while this defect may have been cured by the amended pleading filed after the first trial, yet, in our opinion, it still left the appellee without a cause of action. There is nothing in the letter written by the appellant to the appellee from which a libel or slander can be implied, but on the contrary it seems to have reference to a business transaction between the two parties in which the appellant notifies the appellee that at the proper time he (the appellant) would have plenty of money.

The letter reads:

"Mr. J. B. Parks:

Dear Sir:—I received your note to-day. I know I am to get one-third of the office if you are elected, and will have plenty of money at the proper time.

L. LENTY."

It is alleged in the petition as amended that the appellant had obtained a judgment against the appellee for a large sum of money in an action for money had and received, or for money loaned him by the appellant, and that after the rendition of the judgment the appellee filed grounds for a new trial, and these grounds accompanied the letter already alluded to as evidence conducing to sustain his defense, the defense being that the money for which the judg-

ment was obtained was expended for the purpose of securing Parks' election as marshal, and that Lenty, under an agreement between them, was to make this expenditure, and as a consideration therefor become Parks' deputy.

It is also alleged that the appellant, in speaking of this letter, pronounced it a forgery, but it is not alleged that those present and to whom the words were spoken knew the character of the action in which the judgment against the appellee had been obtained; nor is it alleged that the action between the parties was the subject of the conversation between the appellant and those to whom the alleged slander was spoken and published. Nor is it averred that the bystanders knew the contents of the letter, the action to which it had reference, or its relevancy to the issue made. That such an action was instituted and a judgment rendered, with the additional statement that a letter was written to and received by Parks from Lenty, and made one of the grounds for a new trial, are facts definitely stated, but there is an entire failure to allege that the parties present and who heard the alleged slanderous words knew or were then informed of the principal facts alleged.

There is nothing slanderous in the letter exhibited, and no colloquium, between the appellant and those he was addressing, authorizing the listeners to conclude that the appellant was charging the appellee with the commission of a crime that would subject him, if true, to punishment or to a criminal prosecution.

It will not be presumed that the bystanders knew the character of the action brought by the appellant, or the nature of the agreement between the two, with reference to the office, nor that they were informed as to the contents of the letter, or its relevancy to the question at issue on the motion for a new trial. The amendment filed applies to every count in the original petition, but in the third count it is directly alleged that appellant said of the appellee, "I will have Parks indicted for forgery by the grand jury." These words, if proven, constituted a cause of action and carried with them a charge of a criminal nature. The case, however, went to the jury on the other counts as well as the third count, when the first and second counts contained no cause of action, and for that reason the judgment must be *reversed* and cause remanded for further proceedings.

The questions on the pleadings have alone been considered.

S. S. Parks, William Lindsay, D. M. Rodman, John Rodman, for appellant. E. E. McKay, for appellee.

R. L. COLEMAN, ET AL., v. MOSES HESS, ET AL.

Devisee's Liability for Testator's Debts.

Devisees, receiving by way of advancements, can only be required by a creditor of the devisor to pay what was received under the will after the death of the testator. What is given as advancements prior to the testator's death cannot be included in the estimate in order to fix the extent of the devisee's liability.

APPEAL FROM WARREN CIRCUIT COURT.

March 18, 1880.

OPINION BY JUDGE PRYOR:

No affidavit or demand was necessary to be made against the devisees, and if a demand had been necessary it is too late to make the objection for the first time in this court. Nor was it necessary that a settlement should have been had of the estate of Coleman in order to ascertain the liability of each devisee, but it was necessary before a joint judgment could be rendered against the devisees to show that each devisee has received a sum sufficient by way of devise to pay off this debt. It is neither alleged in the petition nor shown by the proof that such was the case. It is alleged that the two devisees received each \$——, which, together with their interests in the real estate, is amply sufficient to pay the debt. It is nowhere alleged that they each received a sum sufficient for that purpose, and therefore a joint judgment was improper.

Besides, the devisee, receiving by way of advancements, so far as the creditor is concerned, can only be made to pay what was received under the will after the death of the testator. The devisee is being pursued for the debt of the devisor by reason of having received assets devised. What was given prior to the death of the devisor cannot be included in the estimate in order to fix the extent of the devisee's liability. The record does not show that the obligors were released by the execution of another bond. It does not appear on whose motion or at whose instance the last bond was executed, and it seems not to have been given at the instance of the sureties on the first bond. The only question in this case is as to the extent of the assets received by the devisees, and it does not clearly appear that a joint judgment could have been rendered for the reason already indicated.

Judgment *reversed* and cause remanded for further proceedings consistent with this opinion.

J. W. & George R. Gorin, for appellants.

J. H. Rose, for appellees.

J. C. HENDRICKS v. JAMES GARRETT.

Deposition in Equitable Action.

The statute, providing that no person shall testify for himself in an equitable action, after taking other testimony for himself in chief, is not violated so as to prevent such person from testifying where he has taken the depositions of other witnesses before giving his own, but withdraws the depositions taken before his own and does not offer such depositions in evidence.

Judicial Notice.

The court, without evidence, will presume that a town lot is not susceptible of division without substantially impairing its value.

APPEAL FROM OLDHAM CIRCUIT COURT.

March 18, 1880.

OPINION BY JUDGE COFER:

This was a suit in equity. The appellee took one or more depositions before giving his own. These were then withdrawn by leave of court. He then gave his own deposition, but did not retake the depositions of the witnesses whose depositions had been withdrawn, nor read those that were withdrawn.

The appellant excepted to the deposition of the appellee on the ground that he gave it after taking other testimony for himself, in chief. The court overruled the exception, and we think properly. The statute provides that no person shall testify for himself "in an equitable action, after taking other testimony for himself, in chief."

The object of this provision was to prevent the temptation to a party to commit perjury in order to corroborate the testimony of his witnesses or to supply defect or omissions in their statements. And when a party has inadvertently taken the depositions of other witnesses before giving his own the danger the statute was intended to guard against is entirely avoided by the withdrawal of the depositions previously taken, and by omitting to offer the depositions of the witnesses previously examined.

The burden was on the appellant to establish his defense by a preponderance of the evidence. This he failed to do, and the judgment was right on the merits.

The court will presume that a town lot is not susceptible of division without substantially impairing its value, and the affidavit of Mr. Clayton proves the fact without regard to the presumption.

Judgment *affirmed*.

D. M. Rodman, James Clare, for appellant.

J. W. Clayton, Carroll & Barbour, for appellee.

MARY BOYD *v.* SPENCER BOYD, ET AL.

Dower of Wife.

When the heirs and devisees of the husband over the claim and protest of the widow receive all the money from the sale of real estate they become liable to her for such dower.

APPEAL FROM BATH CIRCUIT COURT.

March 20, 1880.

OPINION BY JUDGE PRYOR:

It is not necessary to discuss again the right of Mrs. Boyd to dower in the land, or rather the proceeds of the land sold by the creditors of her husband. It has been twice decided that she was entitled, and there must be an end to litigation.

The heirs and devisees of Spencer Boyd have received this money, and to the extent of assets they are liable. If all are not before the court some have received a sum sufficient to more than pay the appellant, and these parties should be required to pay and look to the other devisees for contribution. If Mrs. Boyd is enabled to assert this claim it is because of the action on the part of Spencer Boyd's representatives in refuting her right to dower in the original action.

The land sold to Wright & Jones for \$16,028. The dower interest of Mrs. Boyd was one-third for life. The absolute value of her dower interest is \$3,216. The question is: When is this sum to begin bearing interest? The claim of Mrs. Boyd was not properly asserted against these devisees until the 17th of March, 1876, and although the money had been long since paid to the representatives of Spencer Boyd, this dormant claim against the heirs and devisees ought not to be doubled by adding to it the accumulated interest,

prior to March 17, 1876, when the claim was for the first time legitimately made against the devisees or their representatives. The \$3,216 should bear interest from that date, March 17, 1876. A judgment on the return of the cause will be entered against the devisees or their representatives for the amount to the extent only of the assets had. The commissioner's report shows what amount each devisee has received. If there is any error as to the amount received by the devisees it may be referred for report on that branch. The amount to which the appellant is entitled must be regarded as settled.

Judgment *reversed* and cause remanded. The appellant is only to be charged for new record in taxing cost.

Reid & Stone, A. Duvall, for appellant.

William Lindsay, N. P. Reid, J. S. Hunt, R. Gudgell & Son, for appellees.

BARTLEY SMITH v. J. B. HAYDEN, RECEIVER, ET AL.

Judicial Sale.

A judicial sale will be set aside when the land sold for more than the amount of the judgment. The commissioner should have offered to sell only so much of the land as would satisfy the judgment.

Description of Land in Judicial Sale Order.

A judgment for the sale of real estate must contain a description of the tracts ordered sold.

APPEAL FROM HARDIN CIRCUIT COURT.

March 20, 1880.

OPINION BY JUDGE PRYOR:

It is hardly necessary to notice the various errors complained of by the appellant, as it is manifest that the sale must be set aside for the reason that the land sold for more than the amount of the judgment. The commissioner had no power to sell the land for a greater sum than would pay the debt and should have offered to sell only so much of the land as would satisfy the judgment. This was not done, but the land was offered and a bid made of \$200 more than should have been realized, and the bid accepted. There is no appeal, as we understand, from the first two judgments, but the appeal is from the last judgment, in which the sale is made not only to satisfy the

debt due by that judgment, but the debts due by the judgments formerly rendered. While no objection could be made to such an order of sale otherwise proper, the fact that the land sold for more than the judgments in the consolidated cases is fatal. The sale made and the exceptions of the appellant on that ground should have been sustained. The petition in the last action, No. 1926, is, we think, good. It alleges an agreement to pay, but the judgment nowhere describes the land.

The judgment is *reversed* for the failure only to describe the land, and the sale must be set aside and a resale ordered; and this order of resale will embrace all the notes for the purchase-money due, including those upon which judgments have been rendered,—in fact, judgments have been rendered on all the notes,—and the cause remanded for further proceedings.

A. B. Montgomery, for appellant.

James Montgomery, for appellees.

JOHN MCGRATH & WIFE *v.* N. T. BERRY.

Homestead.

When the homestead is not waived by a mortgage nor barred by a judgment the land to be sold should be ordered sold subject to the homestead, and such a judgment having been rendered, its effect cannot be enlarged by facts occurring in pais before the sale.

Priority of Homestead.

Where a homestead is held only on a portion of the whole of the land ordered sold, the court should direct the sale of the land not covered by the homestead, before resorting to that portion embraced in the homestead.

APPEAL FROM MARION CIRCUIT COURT.

March 20, 1880.

OPINION BY JUDGE COFER:

When this case was formerly in this court we decided that *on the* facts stated in the petition the appellants were entitled to a homestead in the land, and that decision must be deemed to be *conclusive* on this appeal, unless the appellee has shown some valid defense not then appearing in the record. *McGrath v. Berry*, 13 Bush 391.

That the appellee mistook the legal effect of the mortgage as

drafted by himself presents no ground for defeating the claim to a homestead, and seems not now to be much insisted upon. That the appellants abandoned the possession and removed to another county without any intention at the time to return cannot affect the decision of the case.

The homestead was not waived by the mortgage nor barred by the judgment which was rendered while the appellants resided on the land. The judgment when rendered did not authorize a sale of the homestead, and its effect could not be enlarged by facts occurring in pais before the sale. It was, in contemplation of law, a judgment to sell subject to the homestead exemption, and the purchaser could not acquire a greater interest than the judgment and the law authorized to be sold. *Wing v. Hayden*, 10 Bush 276.

The record does not show the amount for which the land was sold, nor how much of the debt remains unpaid. To the extent of appellee's bid his debt is satisfied, and cannot be revived because the appellant has successfully asserted a right to a homestead. He must stand in the same position as any other purchaser, and the sale having been confirmed, he cannot, so long as the order of confirmation stands unreversed, go behind it to adjust equities. If the balance now claimed as purchase-money did not lose its character as such, by being paid by the appellee to Phillips, it was a lien on the entire 19-acre tract, and the homestead not having been waived by the mortgage that part of the tract not included in the homestead would have to be exhausted first, before resort could be had to that part embraced in the homestead.

Wherefore so much of the judgment as directs a sale of that part of the 19-acre tract embraced in the homestead to pay the supposed balance of the purchase-money is remanded, with directions to dismiss the cross-petition as to that. In all other respects the judgment is *affirmed* on both appeals.

Russell & Arritt, for appellants.

William Lindsay, A. Duvall, for appellee.

JOHN A. GANO, ET AL., v. CITY OF COVINGTON, ET AL.

Construction of Deeds of Conveyance.

In construing deeds regard must be had to their language, the situation of the land, and other circumstances surrounding the parties and the land conveyed.

APPEAL FROM KENTON CHANCERY COURT.

March 20, 1880.

OPINION BY JUDGE COFER :

A one-third interest in the land now in contest descended to the appellants from their father, R. M. Gano, and it devolves upon the appellees to show that they have been divested of the title thus acquired.

There is no question here as to the right of the city. The chancellor adjudged against the city. From that judgment no appeal is prosecuted. The sole question is between the appellants and those claiming under their deeds of January 13, 1823. If the appellants by those deeds conveyed to Bakewell, Page & Bakewell their interest in the cemetery the judgment must be affirmed; if they did not it must be reversed. The question depends solely upon the proper construction of the deeds. In construing them regard must be had to their language and to the situation of the land, and other circumstances calculated to show whether it was the intention of the parties to embrace the cemetery in those deeds.

At the time the deeds were made it was being used as a place for the interment of the dead of the then town of Covington. It lies in the extreme southwest corner of the 200 acres conveyed by Kennedy to R. M. and J. S. Gano and Corneal. January 11, 1823, two days before the date of the deeds to Bakewell, Page & Bakewell, the appellants, or those from or through whom they derive title, conveyed to Porter 50 acres out of the 200-acre tract lying north and east of the cemetery. This tract separated the cemetery from the land conveyed two days later to Bakewell, Page & Bakewell.

In the deed to Porter they expressly reserved the cemetery. In the deed to Bakewell, Page & Bakewell they make no mention of it. It was separated from the body of the land embraced by those deeds by the tract conveyed to Porter, and had it been intended to convey to them the interest in the cemetery it would have been most natural to have said so in express words, rather than to leave the matter to construction.

It is not at all probable that either party had any thought of including the cemetery, or that the grantors, after having expressly reserved it out of the deed to Porter, intended to convey it by the deeds made two days later to land separated from it by an interven-

ing tract. This construction not only seems to be reasonable in view of the facts and circumstances already adverted to, but is fortified by the fact that in the subsequent partition between Bakewell, Page & Bakewell, and the heirs of John S. Gano, no account was taken of the cemetery.

We are therefore of the opinion that the appellants never parted with their one-third interest in the land in contest, and that the court erred in failing to adjudge it to them.

Judgment *reversed* and cause remanded for a judgment in conformity to this opinion.

William Lindsay, T. F. Hallam, J. G. Carlisle, for appellants.
Benton & Benton, for appellees.

JAMES W. WILLIAMS' ADM'R *v.* JAMES B. CAMBEST, ET AL.

Title to Personal Property of an Intestate.

Upon the appointment and qualification of an administrator of an intestate the title to all the goods, chattels, and credits of the intestate vests in such administrator. Certain articles of such property are exempt from sale, and may be set apart by the appraisers to the widow or infant children; but until this is done the exempted property is not identified, and the title to all of it remains in such administrator.

APPEAL FROM DAVIESS CIRCUIT COURT.

March 20, 1880.

OPINION BY JUDGE COFER:

Upon the qualification of a personal representative of an intestate the title to all the goods, chattels and credits of the intestate vests in his personal representative. The statute provides that certain articles of property shall be exempt from distribution and sale, and shall be set apart to the widow or infant children of the intestate by the appraisers. Until this is done the exempted property is not identified, and the title to the whole remains in the personal representative.

The plaintiffs alleged that an inventory was made by the administrator amounting to \$431, and that the entire personal estate, as far as they had knowledge of it, was set apart to them as exempt from distribution. By whom was it set apart? The petition does not show, and the allegation that it was set apart was no more than a mere conclusion of law.

As we have seen, the title to all the decedent's personal estate vested in the administrator, and it was necessary that the plaintiffs should show that it had subsequently vested in them, and in order to do this they should have alleged that it was set apart by appraisers duly appointed, for they could not otherwise be invested with title, and without title they are not entitled to recover. The plaintiffs will not in any event be entitled to interest except from the time of the conversion of the property.

Judgment *reversed* and cause remanded for further proper proceedings.

Williams & Powers, for appellant. Sweeney & Son, for appellees.

JAMES T. TOMPKINS' ADM'X, ET AL., v. SOUTHERN BAPTIST THEOLOGICAL SEMINARY.

Contract.

The failure to complete the formal evidence of a contract by reducing it into the form of notes does not effect its validity or render it incomplete.

Facts Constituting Contract.

Where a person in answer to a request to subscribe said, "I have concluded to subscribe \$1,000," and refers to the circular for the terms upon which he made the subscription, and the circular specified the instalments and the time for the payment of each, and also stated that notes would be taken for the several instalments, and when he said, "you can call upon me at any time for my signature," it was held that the contract was complete.

APPEAL FROM LOUISVILLE CHANCERY COURT.

March 23, 1880.

OPINION BY JUDGE COFER:

The letter of Mr. Tompkins was in answer to a request to subscribe. In it he says: "I have concluded to subscribe \$1,000," and refers to the circular for the terms upon which he made the subscription. The circular specified the installments and the time for the payment of each, and also stated that notes would be taken for the several installments; and when he said, "You can call upon me at any time for my signature," he no doubt referred to the notes for the installments.

The letter and the circular referred to in it contained all the stipulations necessary to a valid contract. There is nothing in the language of the letter to indicate that he reserved or intended to reserve any right to withhold the subscription, or that his purpose was to signify willingness to make the subscription at some future time. "I have concluded to subscribe," when considered in connection with the closing sentence of the letter, clearly indicates that he understood he was then subscribing, and that nothing remained to be done but to execute notes according to the terms proposed in the circular.

The case is unlike any of those cited in the brief, all of which have been considered. The case apparently most relied upon (*Allen v. Roberts*, 2 Bibb 98) was decided on the ground that the letter was intended only to give information that the land was for sale, of the price and payments which would be required, and the time when the writer would be in the county. No time for payment was indicated in the letter, the land was not described, and the closing sentence showed that the writer looked to further negotiations when he should visit the county. If he had said, "I shall be down in your county this fall without fail, and will then make you a deed," or "You may then call upon me for a deed," the case would have been more like the case at bar.

If Mr. Tompkins had meant merely that he was inclined to subscribe, or that he thought he would do so, we cannot suppose he would have used the language found in his letter. In that case it would have been unnecessary to indicate the terms upon which he proposed to subscribe, and the statement in the last sentence would not only be out of place, but positively unmeaning.

If he intended that the question of his subscription should remain open, why say: "You can call upon me at any time for my signature"? According to the views of counsel he meant to say: "You can call upon me at any time and I will decide whether I will give you my signature."

The letter shows that question was already decided, and, as held in *Bell v. Offutt*, 10 Bush 632, the failure to complete the formed evidence of the contract by reducing it into the form of notes does not affect its validity or render it incomplete.

Judgment *affirmed*.

Barrett & Brown, John Marshall, for appellants.

Edwards & Seymour, for appellee.

S. A. GODSHAW *v.* BRAMBERGER, BLOOM & CO.**Grounds for Attachment.**

An attachment cannot be sustained where the evidence clearly shows an amount of property subject to execution, out of which plaintiff's debt could have been paid. The insolvency of a defendant is not sufficient to authorize an attachment.

APPEAL FROM DAVIESS CIRCUIT COURT.

• March 23, 1880.

OPINION BY JUDGE PRYOR:

The first ground for the attachment cannot be sustained, as the evidence clearly shows an amount of property subject to execution, out of which the appellee's debt could have been made. The mere insolvency of the appellant is not sufficient to authorize an attachment under this statute. If the debtor has property subject to execution of sufficient value to pay the debt the attachment should be discharged. Nor is there any evidence of fraud. The validity of the debts for which the mortgages were executed is not questioned, and the fact that an assignment was made for the benefit of all creditors evidences good faith on the part of the debtor in equalizing all of his creditors in the distribution of his assets.

The judgment below, in so far as it sustains the attachment, is *reversed* and cause remanded with directions to discharge it.

Little & Slack, for appellant. Weir & Weir, Walker, for appellees.

KENTUCKY & GREAT EASTERN R. CONST. CO.'S ASSIGNEE *v.* KENTUCKY & GREAT EASTERN R. CO., ET AL.**Jurisdiction in Suit to Enforce a Contractor's Lien.**

A suit to enforce a contractor's lien against a railroad company, in which it is sought to sell not only the rights and franchises of the company, but its tangible property, its roadway and right of way, can only be prosecuted in a county in which the road runs.

APPEAL FROM FRANKLIN CIRCUIT COURT.

March 25, 1880.

OPINION BY JUDGE COFER:

This was not a suit to foreclose a mortgage or deed of trust executed by the Kentucky & Great Eastern R. Co., and therefore if it were conceded that the provision of the charter giving to the Frank-

lin Circuit Court exclusive jurisdiction of such a suit has not been repealed by the new code it would by no means follow that the Franklin Circuit Court had jurisdiction of this case.

The object of the suit was to enforce an alleged contractor's lien, the foundation of which is not very apparent, but certainly is neither a deed of trust nor a mortgage. The company made a deed of trust to the Farmers' Loan & Trust Co., of New York. That company is made a defendant. It may be necessary as an incident to the appellant's suit, if he shall show himself entitled to relief, to enforce the deed of trust to the loan and trust company, but any court that has jurisdiction of appellant's suit must of necessity have jurisdiction of a cross suit by the loan and trust company to enforce its rights; otherwise the court could not settle in one suit the rights of all the parties having liens upon the property in litigation. Such a cross action would be a mere incident to the original action, and would be drawn to it wherever it was rightly brought. But the converse is not true. The appellant seeks to enforce a hostile lien, and he cannot derive support from that source. He must resort to a court that has jurisdiction of his case independently of another and especially one against whom he claims.

Nor is his action transitory. He seeks a sale not only of the rights and franchises of the company, but of its tangible property, its roadway and road superstructure. The right of way is an interest in real estate, and no part of that estate is situated in Franklin county, and consequently the circuit court of that county had no jurisdiction of the subject of the action. Sub-sec. 3, Sec. 62, regulates the jurisdiction in such a case, and the action should have been commenced in some of the counties into which the road runs.

Wherefore the judgment dismissing the petition for want of jurisdiction is *affirmed*.

C. L. Raison, Jr., for appellant. W. H. Wadsworth, for appellees.

W. W. TRIMBLE v. W. T. REDMAN, ET AL.

Husband and Wife.

It is only when the legal right of the husband has not been perfected that the court can intervene to protect the wife against the claim of his creditors; but a husband, by reason of his marriage, has a right to the use of his wife's land, and when they reside on the land and cultivate it he has a legal right to the produce of the farm, and such property is subject to the claims of his creditors.

APPEAL FROM HARRISON CIRCUIT COURT.

March 25, 1880.

OPINION BY JUDGE COFER :

Marriage gives to the husband the right to the use of the land of the wife, and where they reside upon her land and it is cultivated by or under the control of the husband, the produce belongs to him and not to her. Creditors of the husband have no right to insist that he shall exercise his right and claim the use of his wife's land, but, if he does so, the use becomes his, and the produce of the land is in no sense the property of the wife. She has no more right to the produce raised by the husband upon her general estate than she would have to hogs or cattle or wheat purchased by him with her money previously reduced to his possession in the exercise of his marital right. It is only when the creditors of the husband undertake to subject property of the wife, to which the husband has not perfected his legal right, that the wife may interpose to claim a settlement.

The error in the argument of counsel consists in the assumption that the husband's legal right to the wheat was incomplete, and therefore that the debt for the price was a mere chose-in-action. If the wheat had not been sold by the husband, the case of *Moreland v. Myall*, 14 Bush 474, would be authority for holding that it was subject to seizure under an execution against the husband; and it certainly cannot be maintained that, if the wheat was subject to sale under execution against him, he has not a legal title to the price. It is only when the legal right of the husband has not been perfected that the chancellor can intervene to protect the wife against the claim of his creditors. That is not the case here, and however much the court may sympathize with the wife and children of an insolvent husband and father, we can do nothing more or less than to decide the law as we find it.

Judgment *reversed* and cause remanded with directions to render judgment subjecting the sum in contest to the satisfaction of appellant's debts.

A. Perrin, for appellant. J. L. Ward, for appellees.

A. J. MCNESS *v.* HERNE & OWEN.**Partnership Book Admissible as Evidence in Action Between Partners.**

Books of a partnership are admissible in evidence for the purpose of showing entries made therein referring to the items in dispute between them exhibiting certain charges and credits made.

APPEAL FROM HARRISON CIRCUIT COURT.

March 26, 1880.

OPINION BY JUDGE PRYOR:

It is difficult to perceive any valid objection to the introduction of the books of Herne and McNess for the purpose of showing the entry made with reference to the \$700. Here was a controversy between two who had been partners, and resort is had to their books for the purpose of showing certain charges and credits made. This was certainly competent, and the objection made by counsel based on the case of *Brown v. Fall's Adm'r* cannot be made to apply to this case. In that case the entries were offered as evidence against third parties, and, of course, a different rule prevails. Besides, the fact of the entry or the withdrawal of the \$700 is clearly shown, and that it was accounted for by the appellees is equally certain.

It was a mere issue of fact, and no error is perceived to the prejudice of the appellant, either in the objection made to the pleadings or the evidence.

Judgment *affirmed*.

C. W. West, L. M. Martin, for appellant.

A. H. Ward, for appellees.

B. F. SUGGS *v.* LIVERPOOL AND LONDON AND GLOBE INS. CO.**Fire Insurance Policy.**

Where it is stipulated in a fire insurance policy that no additional insurance in any other company shall be carried on the property insured, and that if such additional insurance shall be procured without the consent of the company the first policy shall be void and the insured obtains such other policy without such consent, such policy is void.

APPEAL FROM BOURBON CIRCUIT COURT.

March 27, 1880.

OPINION BY JUDGE HINES:

The policy of the insurance sought to be recovered upon and issued by appellee stipulates against additional insurance in any other company, and provides that, if such other insurance is obtained without the consent of appellee, the policy shall be void. In violation of this stipulation, appellant obtained insurance in another company on the same property. The policy issued on the last insurance stipulates against prior insurance, and provides that it shall be void in case such insurance had been obtained, and the fact not made known to the insurer. Appellant contends that the last insurance was absolutely void, and left the first in full force. He is wrong in any aspect of the case. First, the second insurance was not void, but voidable only at the option of the insurer. (*Baer v. Phoenix Ins. Co.*, 4 Bush 242). Second, if it was void ab initio, that fact would not relieve the appellant from a forfeiture resulting from the violation of the stipulation in the first policy against additional insurance.

Judgment affirmed.

R. J. Page, for appellant. G. C. Lockhart, for appellee.

EDWARD VINCENT v. EDMUND DUFF.**Statutory Liens.**

Liens created by statutes cannot, as against creditors or innocent purchasers, be enforced unless the statute has been complied with; and where no lien is reserved in a deed to secure the payment of interest on the balance of purchase money the vendor has no lien for such purposes.

Personal Judgment.

Where a claim is sued upon and it is sought to enforce a lien, and the debt was not the debt of the defendant originally, nor one that he subsequently assumed, there can be no personal judgment.

APPEAL FROM BARREN CIRCUIT COURT.

March 27, 1880.

OPINION BY JUDGE HINES:

There is nothing in the record to justify the court in concluding that appellee, Duff, was guilty of any concealment or misrepresentation that would operate as a waiver of his lien on the land sought to be subjected. The judgment against appellant is erroneous, how-

ever, in two particulars. First, there should have been no personal judgment against appellant, as the debt sued on was not his debt originally, nor is there anything tending to show any subsequent assumption of the debt by him; and, second, the land should not have been subjected to the payment of interest as no lien was reserved therefor in the deed. Such liens are purely statutory, and cannot, as against creditors or innocent purchasers, be enforced unless the statute has been complied with by specifying the amount due on the purchase price. If the deed, as in this instance, specifies the amount to be paid, with no reference to interest, the lien extends, as against creditors and purchasers, to the amount of the specified debt without interest until after the debt becomes due, and then the land would be liable for six per cent. only. Whatever the liability of the estate of Mayfield may be for ten per cent. interest it was clearly error to adjudge that the land, in the hands of a subsequent purchaser, was liable to sale for its satisfaction.

Judgment *reversed* and cause remanded for further proceedings consistent with this opinion.

Lewis & Porter, for appellant.

William Lindsay, Duff & Allcock, for appellee.

LINCOLN COUNTY COURT *v.* NATIONAL BANK OF STANFORD.

Taxation of Banks and Bank Stock.

It is only the property of a bank that must be listed by it for taxation, and the stock of the bank held by stockholders is not to be listed by the bank.

. APPEAL FROM LINCOLN CIRCUIT COURT.

March 30, 1880.

OPINION BY JUDGE PRYOR:

If the bank stock can be made liable or subject to taxation for county purposes there is no law making the bank an agent for the stockholder to list this estate, and certainly no statute requiring the bank to pay the tax of the stockholder.

It is the property of the bank that must be listed for taxation, and not the property of the stockholder. The case of *Trustees of Eminence v. Eminence Deposit Bank*, 12 Bush 538, is conclusive of this question. The bank owes the amount of the stock to individual

stockholders and cannot be taxed on its liabilities. See *National Bank v. Commonwealth*, 9 Wall. (U. S.) 353.

Judgment affirmed.

W. H. Miller, for appellant.

J. S. & R. W. Hocker, Hill & Alcorn, for appellee.

L. S. BOARD, ET AL., v. SILAS L. MOREMAN.

Sale of Real Estate in Bulk or by the Acre.

In determining whether a sale of real estate is by the acre or in bulk by boundaries the intention of the parties must be determined from all the facts and circumstances proven in the case; but when the consideration named is an uneven number of dollars, and after it is discovered that there is more land than the parties thought, the vendee executes his notes for such excess, these facts tend to show that the sale was by the acre and not in bulk.

Deed as Evidence.

A deed is admissible in evidence even though it was not lodged for record, and not recorded until twenty years after being acknowledged. It is operative from the date of record without reference to the date of acknowledgment.

APPEAL FROM HARDIN CIRCUIT COURT.

March 30, 1880.

OPINION BY JUDGE HINES:

A determination of the question whether the two notes of \$424.87½ each, executed for the supposed excess, are without consideration does not necessarily affect the judgment of the court below. The question preceding that is whether the parties are presumed to have contemplated and intended a sale in gross or per acre. If the evidence shows a sale by boundary, without reference to the number of acres, it may be conceded that the excess of 35 acres is not in itself sufficient to authorize a recovery beyond the amount stipulated in the title bond, and yet the judgment may not be prejudicial to appellants nor in any sense in contravention of their contract. We are at last forced to a determination of the intention of the parties to the contract to be arrived at by all the facts and circumstances proven in the case.

That the parties did not contemplate an excess or deficiency of 35 acres is, we think, made manifest by the evidence. The title bond

as for 449 acres, more or less, for the consideration of \$7,630. If had been a sale in bulk it is reasonable to suppose that the consideration would have been expressed in round numbers instead of the fraction of one hundred dollars. This supposition is strengthened by the fact of the execution of the notes for the supposed excess of 50 acres, and by the anxiety of the parties to have the land surveyed, notwithstanding the fact that he claims that his only object was to locate the lines and courses of the survey. There is no sufficient evidence that any fraud was practiced on Skillman, by Bush or the appellants, to induce him to execute the notes for the 50 acres excess that was represented to exist; nor is it material that the notes were executed for a greater excess than in fact existed. There is every reason to believe that these representations were honestly made; and if they were not, the fact that one of Skillman's business capacity in fact executed the notes is strong evidence that the original contract of sale was by the acre.

Nor is it material that the court below rendered judgment on one of the notes for the excess and scaled the other, for the result would have been the same if a judgment for the excess had been rendered without reference to the notes. They were used and referred to as a convenient method of expressing the amount to which appellee was entitled by reason of the sale having been per acre.

The objection that the petition does not state a good cause of action because it does not allege readiness, willingness and ability of appellee to convey a good title, accompanied by a tender of a conveyance, is not well taken. No demurrer was interposed to the petition, but on the contrary the answer denied that appellee had a good and sufficient title, thus tendering an issue that might have been avoided by proper proceedings before filing of the answer. The demurrer to the answer, which was overruled, does not enable us to review the petition because it is not insisted upon as reaching back to the petition. The failure of the court to apply appellants' demurrer to the petition and answer, tenders a substantial issue that might have been avoided by a motion to make the petition more specific, but a failure to do this and not insisting upon the demurrer as reaching back to the petition and going to trial upon the question of title amounts to a waiver of the defect in the petition.

The evidence of title, we think, is sufficient to entitle appellee to recover. The contract did not require a conveyance until the payment of the purchase money, while the evidence shows possession

by legal title and an adverse holding by appellee and his vendors for a period of from thirty-five to fifty years, without any pretense of claim on the part of anyone else to any portion of the land. Under these circumstances there appears no reason why appellants should not comply with their portion of the contract.

Whether Skillman had authority to sign the notes for the surplus is immaterial, as we have already said. Whether they are binding or not, they may be taken as the measure of recovery; and whether Skillman had authority to sign the name of Board is immaterial, as the judgment for the excess is against Skillman alone, who is certainly bound without reference to the question of authority from Board.

We see no reason why the deed is not good for the number of acres for which the court adjudges appellants must pay. It is immaterial that it purports to convey a greater number of acres than has been determined to be in the boundary sold, and that the consideration is different from that expressed in the title bond. No matter what consideration may be expressed in the deed, appellant is required to pay only such sums as the court has determined he is liable for under his contract of purchase.

The objection to the deed "C" being considered in evidence because not lodged for record and not recorded until some twenty years after it was acknowledged is not well taken. It is operative from the date of record without reference to the date of acknowledgement.

The deed of Wood, commissioner, is sufficient to convey title, notwithstanding it has not been recorded in the county clerk's office. The acknowledgement before the judge of the circuit court and his approval, with the certificate of the clerk to the proper office for record, transferred title. The deed should have been recorded, but it may yet be done so as to make it operative. Appellant may himself cause it to be recorded, and the court should have required it done, but the failure of the court to do so is not sufficient in itself to authorize a reversal.

The fourth exception to the reading of the deeds is too general to require notice. Neither the exception nor the brief of counsel points out any specific objection to them.

Judgment *affirmed*.

W. H. Chelf, for appellants. R. L. Stith, for appellee.

A. W. GRIEF, ET AL., v. McCracken County, ET AL.

Fraud in Conveyance of Real Estate.

When a conveyance of real estate is attacked as fraudulent, or for want of consideration, as between the grantee and creditor of grantor, the burden of proof is on the grantee to show a good and valid consideration.

Recitals in Deed.

Recitals in a deed are not evidence for or against those who are not parties to it.

APPEAL FROM McCracken Court of Common Pleas.

March 30, 1880.

OPINION BY JUDGE HINES:

After a careful examination of the record in this case we are of the opinion that the court below did not err in rendering the judgment complained of. When a conveyance is attacked as fraudulent and for want of consideration, as between the grantee and the attacking creditor of the grantor, the burden of proof is on the grantee to show a good and valid consideration. The recitals in the deed are not evidence against or for those who are not parties to it. The popularity and correctness of this rule is not rendered less obvious when the conveyance, as in this instance, is a family matter, from father to sons. Under all the circumstances surrounding this case it was incumbent on the appellants to produce satisfactory evidence of payment for the property purchased.

It must be conclusively presumed to have been within their power to do so, but they have failed. They state in a general way that they owe nothing; that they have paid for one lot; that they have supported the father and two children as they agreed to do in payment for the other lot; and that they have paid to F. Grief his portion of the profits from the shop. But, as against these general statements, remains the fact that at the time of the purchase of this property by appellants they had nothing, that they now own it free from all outside claims, and that the payments have been made, according to their theory, out of the proceeds of their labor and income from the shop, in the proceeds from which F. Grief was entitled to one-third. They have expended some \$3,500 in building on the lots, supported their own families, have a large stock in trade, owe comparatively little, and yet F. Grief has nothing to show for his third

of the profits which he should now have if the appellants have supported him and the two children as they agreed to do.

Without reference to the question of fraudulent intention on the part of appellants, and giving them credit for honest and fair dealing, it was nevertheless incumbent on them to satisfactorily show that they had discharged their obligation to support F. Grief and the children, and had paid the purchase price for the other lot, and had paid over to F. Grief his proportion of the profits of the business. This they do not do. They kept no books, took no receipts for moneys paid, and produce no outside evidence of payment. The evidence is such that we could not feel disposed to disturb the judgment if it were for a much larger sum.

The county of McCracken had authority to sue. In a suit to determine the right of the county to recover, the treasurer is not even a necessary party, and if he were a proper party no objection was made, as required in the code, to the failure to make a party.

We see nothing in the other assignments of error that need be discussed. They present no available error.

Judgment *affirmed*.

P. D. Geiser, for appellants. Bigger & Reid, for appellees.

JOHN B. WILGUS *v.* TRUSTEES OF CINCINNATI SOUTHERN R. CO.,
ET AL.

Subscription Contract.

Where one subscribes to a fund with certain conditions attached to his subscription, and afterward signs a substitute subscription to take its place, which has no conditions attached to it, the conditions upon which the first subscription is made do not become a part of the second subscription.

APPEAL FROM FAYETTE CIRCUIT COURT.

March 30, 1880.

OPINION BY JUDGE HINES:

The questions mainly discussed by counsel have been determined in favor of appellees in the case of *Berryman v. Cincinnati Southern R. Co.*, 14 Bush 755. There appears to be nothing in the case of exclusive equitable cognizance that would entitle the appellant to a transfer of the case to equity, and no defense presented of which the appellant might not get the full benefit in an action of law.

The court properly overruled the exception to the deposition of Tatem. The certificate of the officer, as well as the body of the deposition, shows that it is the deposition of Tatem. A compliance, as in this case, with the provision of Sec. 582 of the code controls the caption. There was no error in refusing testimony to the effect that appellant had previously refused to make subscription upon the terms embraced in the paper sued upon. That paper sets forth the terms or conditions upon which the subscription was made, and shows that it was in substitution of the first subscription, and can be impeached only for fraud or mistake. There is no evidence of any fraud whatever, and if it be conceded that appellant signed the paper sued upon under the mistaken belief that the conditions appended to the first subscription were embraced in and qualified the second, appellant is estopped to set up that fact as against appellees. The person who obtained the subscription was in no sense the agent of the appellees, but as between appellees and appellant he was the agent of the appellant; though, when the subscription was tendered, the construction to be applied is the same as if the appellant had delivered the subscription in person without notification of any conditions other than as expressed in the writing. Obligations having been incurred and money expended by appellees on the faith of the representations contained in the paper sued on, it is too late for appellant to say that he did not intend what its language clearly imports.

Judgment *affirmed*.

Huston & Mulligan, D. G. Falconer, for appellant.

Beck & Thornton, C. B. Simrall, for appellees.

WILLIAM M. RIGGS v. N. F. WAITLOW.

Instructions.

The Court of Appeals cannot consider instructions given below where the bill of exceptions does not show that any objections to them were made by the appellant. The code of practice requires both an objection and an exception.

APPEAL FROM METCALFE CIRCUIT COURT.

April 1, 1880.

OPINION BY JUDGE HINES:

We see no reason for reversing this case because the verdict is not supported by the evidence. The verdict is not flagrantly against the

evidence. If it be conceded that the weight of evidence is against the finding, it is yet true that there is much in the evidence tending to support it, so much, at least, that we deem it unnecessary to enter into a detailed discussion of it.

We cannot consider instructions No. 4, 5 and 6, given on the motion of the defendant, as the bill of exceptions does not show that any objection to them was made by the plaintiff. The code of practice requires both an objection and an exception. *Loving v. Warren County*, 14 Bush 316. There was no error in refusing to give instruction No. 1. While we may not reverse for any error that may appear in instructions Nos. 4, 5 and 6, we may refer to them in order to determine whether appellant was prejudiced on account of the failure to give instruction No. 1. By reference to them we find that the view of the law covered by that instruction is substantially given in instructions Nos. 4, 5 and 6, and that, therefore, appellant could not have been prejudiced even if No. 1 contained the law in the case.

If all the exceptions of the appellant to the depositions be well taken there appears no reason for disturbing the verdict and judgment.

Judgment affirmed.

J. W. Campton, for appellant. Leslie & Botts, for appellee.

H. H. BUTTON, ET AL., v. J. R. BIGGERS, ET AL.

Husband and Wife and Husband's Creditors.

Where a husband desired to purchase a tract of land, and it was agreed between himself, his wife and his wife's father that in consideration of the wife receiving conveyance of one hundred acres thereof, her father would pay her five hundred dollars, to be used in making the purchase, and the purchase is made by the husband, who pays for the land except the five hundred given by the wife and takes the land in his and his wife's name, but afterward conveys to the wife the one hundred acres, such land cannot be made subject to the husband's debts incurred after the purchase, but before the conveyance to the wife, especially where such creditors knew the wife was claiming the land.

APPEAL FROM BARREN CIRCUIT COURT.

April 1, 1880.

OPINION BY JUDGE HINES:

J. R. Biggers and J. J. Walker had purchased a certain piece of land, and, before all the purchase money had been paid, it was agreed

between J. R. Biggers, his wife, N. H. Biggers, and her father, J. D. Smith, that, in consideration of J. D. Smith furnishing N. H. Biggers \$500 to be used in paying for the land, N. H. Biggers was to have 100 acres of the land to be taken from a designated portion of the tract and conveyed to her in her own right. In pursuance of this agreement Smith paid the \$500 to Mrs. Biggers, who gave it to her husband a few days after to be used in payment for the land. Subsequently, J. R. Biggers having paid the whole of the purchase money, the commissioner conveyed the whole tract of 264 acres to Biggers and wife jointly, but Mrs. Biggers being unwilling to accept the conveyance, J. R. Biggers conveyed to her the specified 100 acres, as was agreed should be done when the \$500 was paid by Smith.

This proceeding was instituted by the creditors of J. R. Biggers to subject this 100 acres to the payment of their claims, and it was held by the court below not to be subject. The debts for which the land was attempted to be subjected were created after the payment of the \$500 by Smith, but before the conveyance to Mrs. Biggers was made. At the time the debts were created these creditors had written notice that Mrs. Biggers was asserting some sort of claim to this land, as is made manifest by their inquiry of her husband; but notwithstanding that fact they made no inquiry of her, but contented themselves with the statement made by the husband that the land belonged to him. Mrs. Biggers did no act to mislead them, and if they have been misled it is no fault of Mrs. Biggers.

It is wholly immaterial whether the particular \$500 was paid on the land by the husband. The purchase of the 100 acres was made and the money paid by Smith when the equitable title was in J. R. Biggers, and Mrs. Biggers then became entitled to a conveyance of the 100 acres. This equity of hers was perfected into a legal title by the conveyance from her husband. Her equity, untainted by any evidence of fraud on her part, is superior to that of the creditors of her husband, and having ripened into a legal title will not be disturbed. All the evidence of the declarations made by the husband is incompetent as against Mrs. Biggers, and that being the case there is nothing to raise a supposition that the whole transaction, so far as she is concerned, was not free from fraud.

The Wilbur note Mrs. Biggers is entitled to. The money with

which it was purchased came from her father and was never reduced to possession by the husband.

Judgment *affirmed*.

Lewis & Porter, for appellants. Leslie & Botts, for appellees.

PLEASANT PERKINS *v.* HART COUNTY COURT.

County Paupers.

There is no legal obligation on the county to pay for the support of its paupers, but it may, through its court, assume such liability. Mere promises of members of the court are not enforceable as against the county, as the court can only speak through its records through official action.

APPEAL FROM HART CIRCUIT COURT.

April 8, 1880.

OPINION BY JUDGE HINES:

It is well established that courts of record can speak only by their records. There is no legal enforceable obligation on the county to pay for the support of her paupers, but the county may, speaking through the fiscal court, assume such liability; but the promise of every member of that court will not render the county liable to pay anything unless the promises are formulated into official action. Therefore, as it is admitted by the parties to the record that there was no allowance made by the court, speaking through its records, for the support of the paupers, it follows that it is not necessary to consider the question raised on the admission and rejection of evidence. No amount of evidence short of record evidence can affect the question of the liability of the county.

Judgment *affirmed*.

Dawson & Martin, for appellant. J. R. Curle, for appellee.

JAMES TWYMAN *v.* JOHN L. CROSS, ET AL.

Husband and Wife—Devise to Wife.

A chose in action devised to the wife during coverture belongs absolutely to the husband, whether reduced to possession before or after the death of the wife.

APPEAL FROM LARUE CIRCUIT COURT.

April 8, 1880.

OPINION BY JUDGE HINES:

In this case there was a devise to Mrs. Cross of \$500, one hundred of which was paid to her, and after her death the executor paid the remainder to her husband. This suit is brought by the heirs of Mrs. Cross against the husband and the executor, to recover the amount paid to the husband after the death of the wife. In such a case, a chose in action devised to the wife during coverture belongs absolutely to the husband, whether reduced to possession before or after the death of the wife. It is not like the case when the chose in action is coming to the wife at the time of the marriage, and is not reduced to possession by the husband during the life of the wife. *Tobin's G'd'n. v. Dixon*, 2 Met. 422. The court did not err in sustaining the demurrer to the petition.

Judgment affirmed.

S. H. Bush, for appellant. W. H. Chief, for appellee.

GEORGE W. NEIL, ET AL., v. ZACHARIAH NEIL, JR., ET AL.

Conveyance of Real Estate as Trust.

Where, by a written instrument, real estate is transferred to a husband and wife, and at the death of said husband and wife the lands are to be equally divided among all the children, and it is provided in the instrument that the conveyance is made "for their mutual and joint support and to the survivor of them," the word "their" is held to refer to the husband and his wife, and not to them and their children.

APPEAL FROM DAVIESS CIRCUIT COURT.

April 14, 1880.

OPINION BY JUDGE COFER:

The word "their," in the phrase "for their mutual and joint support and to the survivor of them," must be held to refer to Zachariah Neil and his wife, and not to them and their children. Otherwise the provision that "at the death of Zachariah Neil and Elizabeth, his wife, the lands to be equally divided among all the children" is repugnant and nugatory. This is, we think, the clear legal, though certainly not the grammatical, construction of the trust. Up to the time fixed for partition of the land the rents and profits were to be used for the mutual and joint benefit of the beneficiaries, and were

to be enjoyed by them in common. It certainly was not the intention that the children should thus enjoy it during their whole lives and the life of the survivor, for the writing directs that at the death of Zachariah Neil and wife the land shall be divided among the children, which cannot be done if appellants' construction is right. In giving a contrary construction we are satisfied that we are giving effect to the intention of the maker of the trust.

Judgment *affirmed*.

G. W. Williams, G. W. Jolly, for appellants.

W. N. Sweeney, for appellees.

JOHN C. LOVE *v.* G. P. HARRISON, ET AL.

Damages on Dissolution of Injunction.

It is only necessary to assess damages on dissolution of an injunction in those cases where such injunction was to stay proceedings on a judgment.

APPEAL FROM PULASKI CIRCUIT COURT.

April 14, 1880.

OPINION BY JUDGE COFER:

It is only necessary to assess the damages on the dissolution of an injunction in cases in which the injunction was to stay proceedings on a judgment. Section 295, Civil Code; *Rankin v. Estes*, 13 Bush 428; *Logsdon v. Willis*, 14 Bush 183.

Judgment *reversed* and cause remanded with directions to overrule the demurrer to the petition.

Morrow & Newell, for appellant.

M. H. EGGREN, ET AL., *v.* PHEBE BELL.

Filing of a Suit is a Lis Pendens.

The filing of a suit to foreclose an indemnifying mortgage, even where it fails technically to set forth a good cause of action, but where the court has jurisdiction of the parties and the subject-matter, amounts to a lis pendens, and one buying the property after such suit is entered is bound to take notice of it.

Demurrer or Motion to Make More Specific.

Defects in a petition may be taken advantage of only by demurrer or by motion to make more specific.

APPEAL FROM McCracken Circuit Court.

April 14, 1880.

OPINION BY JUDGE HINES:

It is clear that at the time the appellants purchased the road and franchise in March, 1877, there was a suit pending by Bell's administrator and the City National Bank of Paducah to foreclose the mortgage executed to indemnify Bell, and that under the decree rendered in that case appellee became the purchaser. On an appeal to this court that judgment was affirmed and the title confirmed in appellee.

It is contended by appellants that there was no *lis pendens* at the time of their purchase because the original petition in the case of Bell's Administrator and National Bank *v.* Johns, filed August, 1876, failed to set forth a good cause of action, and that it was not until after appellants' purchase that the pleadings, as amended by the bank, authorized the judgment rendered in that case. That the court, in the case against Johns, had jurisdiction of the pleaders and of the subject matter cannot be questioned.

But appellants insist that the original petition was defective because it did not specifically allege a promise to pay, and did not ask that the bank be substituted to the rights of Bell under the mortgage. That is true, but the petition gave a general description of the indebtedness, stated the relation of the parties, specified the purpose for which the mortgage was executed, and asked that the mortgage be foreclosed to pay the indebtedness to Bell on his own account, and to pay the amount due the bank to secure which the mortgage was executed. This was a substantial statement of a cause of action, the defect in which could be taken advantage of only by demurrer or by motion to make more specific. There was not a failure to state a cause of action, but merely a defective statement, containing a sufficient description of the property sought to be subjected, and in every sense ample to put appellant upon inquiry. With actual as well as constructive notice of the pendency of this suit under which title was acquired by appellee, appellant will not be heard to say that there was no *lis pendens* in reference to the property. The *lis pendens* dates from the filing of the original petition

by Bell's administrator and the bank, and not from the filing of the amendment by the bank.

Judgment *affirmed*.

Gilbert & Reid, William Lindsay, for appellants.

A. Duvall, Houston & Houston, for appellees.

WILLIAM P. TAYLOR'S G'D'N v. S. W. TALLIFERRO.

Infant Party to Suit.

When an infant is made a party plaintiff by his guardian he is before the court as much as where he is named a defendant and summons served on his guardian.

Jurisdiction to Sell Ward's Land.

Where a guardian petitions for an order to sell his infant ward's land, the court has jurisdiction, whether the infant was in court as plaintiff or defendant.

APPEAL FROM TODD CIRCUIT COURT.

April 14, 1880.

OPINION BY JUDGE PRYOR:

The infant was made a party plaintiff to the petition filed by the guardian, and was as much before the court as if she had been made a defendant and the summons served on the guardian. The proceeding is at best informal, and if even regarded as erroneous the title passed to the purchaser. The fact that she was not a party to the amendment asking that the proceeds be reinvested is a question between the guardian and infant and in which the purchaser is in no manner interested. The court below had jurisdiction to sell the land on the petition of the guardian, and whether the infant was in court as plaintiff or defendant is immaterial, as she is represented by the guardian; and, besides, a reversal of the case would not have the effect to disturb the sale unless the proceeding should be declared void, which will not be done. This title obtained by the appellant is the only defect complained of by the appellee that has not been cured, and the judgment must be reversed and the cause remanded with directions to render judgment for the appellant in the event a deed is tendered, and in the event the deed from the commissioner embraces the land sold. This, we think, however, is admitted by

he answer, but as some question is made in the brief it may be proper that this fact should be made to appear.

Judgment *reversed* and cause remanded for further proceedings consistent with this opinion.

Ben T. Perkins, Jr., for appellant. H. G. Petrie, for appellee.

A. J. BAKER, ET AL., v. H. B. HAMPTON, ET AL.

Injunction Without Notice.

When a petition for an injunction is sworn to, and the court is satisfied by the affidavit of the applicant, or by other evidence, that irreparable injury will result if the injunction be not immediately granted, he may grant it without a notice first served on the defendant.

Sale Bond Under Void Judgment.

When a judgment is rendered, and pending a motion for a new trial but before it is decided, an execution is issued and property of the defendant levied upon and sold by the officer, who took a sale bond for the price of the sale, after which the motion for a new trial is granted and the judgment set aside, such sale bond is rendered void, and if an execution is issued upon it the collection may be enjoined. Property of the defendant purchased on execution under a judgment should be returned to him when the judgment is set aside.

APPEAL FROM OWSLEY CIRCUIT COURT.

April 15, 1880.

OPINION BY JUDGE HINES:

Taking the allegations of the petition and amended petition to be true, appellees had obtained a judgment against A. J. Baker, and pending a motion for a new trial they caused an execution to issue and be levied upon a horse belonging to A. J. Baker, which was sold by the officer to J. W. Baker, who executed a sale bond. Subsequently the motion for a new trial was sustained, and the judgment in favor of appellees set aside. After this motion was sustained appellees caused an execution to issue on the sale bond, and had it levied upon a lot of logs belonging to J. W. Baker. In the meantime J. W. Baker, believing that the setting aside of the judgment operated to cancel his bond and to deprive him of any right to the horse, returned him to A. J. Baker.

The court below sustained a demurrer to the petition and amended

petition apparently because no notice of the application had been given. Section 276 of the code requires notice unless the court shall be satisfied, by the affidavit of the applicant, or by other evidence, that irreparable injury will result to the applicant if the injunction be not immediately granted. The petition and amended petition which were sworn to, and the affidavit filed with them, appears to be sufficient evidence upon which the court should act without notice. Besides, appellees were in court, manifesting no reason why the injunction should not be granted. It is clear that if the judgment on which the execution issued was subsequently set aside the sale bond was thereby rendered void, and it became the duty of J. W. Baker to deliver the horse to the person from whom it was taken under the execution.

Judgment *reversed* and cause remanded with directions to grant the injunction, and unless the facts set forth in the petition and amended petition are successfully controverted the injunction should be made perpetual.

W. L. Hurst, S. P. Hogg, for appellants.

H. C. Lilly, for appellees.

H. C. PATTERSON *v.* S. W. MOSBY.

Exemption of Housekeeper.

In the absence of a contract by which a debtor is deprived of the right to claim an exemption against a debt, the only inquiry to be determined is whether the debtor is a bona fide housekeeper with a family resident in this state, and whether the thing claimed as exempt is embraced by the statute.

APPEAL FROM DAVIESS CIRCUIT COURT.

April 15, 1880.

OPINION BY JUDGE COFER:

The statute declares that there shall be exempt from execution, attachment, distress or fee-bill against a bona fide housekeeper with a family, resident within this commonwealth, a sufficiency of bread-stuff to sustain his family for one year and a sufficiency of provender to sustain the exempted stock for a like period.

In the absence of a valid contract by which a debtor is deprived of the right to claim the exemption, the only inquiries in such a case

as this are, (1) whether the debtor is a bona fide housekeeper with a family resident in this state, and (2) whether the thing claimed as exempt is embraced by the statute. Both these facts seem to be conceded in this case. That the appellant was a sub-tenant under Clements, who also claimed, and was allowed a similar exemption, cannot affect the question.

If it were proper to consider that fact at all, and to decide the case upon equitable principles, the fact would be against rather than in support of the views of appellee's counsel. The appellee rented to Clements with the understanding that he was to sublet a part of the land, which was accordingly done. The appellant does not owe and never agreed to pay appellee any rent. It is alone in view of a stern rule of law, which makes the property of one man subject to the debt of another, that the appellee had a right to subject any part of the corn to the satisfaction of his debt, and he has no right to complain that another equally stern rule exempts a portion of the crop from sale.

Judgment *reversed* and cause remanded for further proceedings in conformity to this opinion.

Owen & Ellis, for appellant.

Weir, Weir & Walker, for appellee.

COLEMAN MAYS v. JAMES MAYS.

Guardian and Ward—Removal of Guardian.

A guardian cannot be removed without notice to him of the proceedings for that purpose.

Guardian's Settlement.

Where one is appointed as guardian, and the ward, on arriving at fourteen years of age, chooses another guardian, who is appointed by a court in another county, and such first guardian pays over to the latter one what was then in his hands belonging to the ward, the second appointment not being legal, he remains liable to his ward the same as he would have been if he had not paid the guardian selected by the ward and illegally appointed.

APPEAL FROM WASHINGTON COURT OF COMMON PLEAS.

April 15, 1880.

OPINION BY JUDGE COFER:

In March, 1855, the appellee, James Mays, was duly appointed, by the Washington County Court, guardian of the appellant whose

father died in 1854, domiciled in that county. The appellant attained majority in 1874, and in 1875 brought this suit against the appellee for a settlement of his accounts and to recover an alleged balance due from him.

The appellee answered, among other things not necessary to be stated, that the appellant on the 21st of October, 1871, being then over the age of 14 years, went personally before the county court of Green county and chose George Brown as his guardian, who was appointed and qualified as such, and that two days afterward he (the appellee) paid to Brown the balance in his hands due to the appellant.

It does not appear where the appellant resided when the order of the Green County Court appointed Brown guardian was made, nor that the appellee had notice of the application to have the order made. It has been settled by numerous decisions of this court that a guardian cannot be removed without notice to him of the proceedings for that purpose. *Montgomery v. Smith*, 3 Dana 599; *Isaacs v. Taylor*, 3 Dana 600.

No notice appears to have been given to the appellee, and for that reason alone, if for no other, the Green County Court had no jurisdiction, and its order appointing Brown was void. *Montgomery v. Smith*, 3 Dana 599. It results, therefore, that the payment made to him by the appellee was unauthorized, and constitutes no defense to this action.

The statute is peremptory that interest shall be charged against a guardian in biennial rests. Sec. 10, Art. 2, Chap. 48, Gen. Stat., and the same provision was contained in the Revised Statutes.

We are therefore of the opinion that the appellee should account for the balance in his hands, irrespective of the payment to Brown, and that he should be charged with interest in biennial rests to the time of appellant's majority, and therefore with simple interest only.

Judgment *reversed* and cause remanded for a judgment in conformity to this opinion.

Brown & Lewis, for appellant. W. E. Riley, for appellee.

J. D. OGDEN v. HATTIE BEN OGDEN, ET AL.

Depositions.

A deposition is not admissible as evidence where no notice is given to the adversary of the time and place, when and where it was taken, and where no opportunity was given him to cross-examine the witness.

Execution of Wills.

An acknowledgment of a will by the testator as required by the statute is sufficient evidence of the fact that the signature was made by the testator himself, or by some one for him, by his direction.

Guardian and Ward—Limitations.

Where a guardian has by fraud procured property or an estate which he should hold as trustee for his ward, but holds it until five years have elapsed, he cannot be allowed to set up the statute of limitations to defeat the claim of his ward to such property, and a court of equity should restrain him from setting up such statute.

APPEAL FROM DAVIESS CIRCUIT COURT.

April 15, 1880.

OPINION BY JUDGE HINES:

We think the court below erred in admitting the deposition of Mrs. Sallie Davis. It appears from the caption to have been taken in a proceeding between the same parties, but there is nothing to show what the issue was, nor is there anything to indicate that appellant had any notice of the taking of the deposition, or any opportunity to cross-examine. Unless the issue was the same, the parties the same, and an opportunity given to cross-examine, it is clearly incompetent. So far as it appears in this record the deposition is merely an ex parte statement by Mrs. Davis, made in reference to a matter not involved in the case at bar. Without this deposition the evidence is such that the jury might have found for the will, and its admission was therefore prejudicial to the substantial rights of appellant, and for which alone the judgment should be reversed.

Some question is made as to the correctness of the instructions, in order to determine which it is necessary to refer to the statute in reference to the execution of wills. Sec. 5, Chap. 113, title "Wills," is as follows: "No will shall be valid unless it is in writing, with the name of the testator subscribed thereto by himself, or by some other person in his presence and by his direction, and moreover, if not wholly written by the testator, the subscription shall be made or the will acknowledged by him in the presence of at least two credible witnesses who shall subscribe the will with their names in the presence of the testator."

It seems to be requisite that the will be signed by the testator himself, or by some one for him, and by his direction or request previously given or made. This requirement is fully set forth in the in-

structions, but in such a way as to have probably misled the jury, not so much as to the fact of an authority to sign for the testator, but rather as to the character of evidence necessary to establish that authority. It seems to us that an acknowledgment of the will by the testator, as required by the statute, is sufficient evidence of the fact that the signature was made by the testator himself or by some one for him and by his direction. The jury should have been instructed, in effect, that if they believed from the evidence that the testator acknowledged the will with the formalities required by the statute such acknowledgement was sufficient evidence of the fact that the signature to the will was placed there by the testator, or by some one for him and by his direction, or at his request. In other respects the instructions are substantially correct.

The court did not err in overruling the plea of the statute of limitations as to Hattie Ben Ogden. The relation between the infant and appellant was such that in good conscience appellant ought not to have been permitted to interpose such a plea. He was the guardian of her person and her property. It is claimed that the property held and claimed by the appellant in fact belongs to the infant, and that appellant acquired it by fraudulently procuring the will to be executed under which he asserts claim. If the fraud is established the property is held in trust by the guardian for his ward, but appellant neglected to have that question investigated, holds to the property until five years have elapsed, and then, in effect, says, "Admit the truth of the charge that I obtained the property by fraud and that it in fact belongs to the ward, and that I have held and claimed it in violation of my duty to my ward and in ignorance on her part of her rights; it is now too late to test that matter." Time cannot sanctify such a fraud, nor should it be permitted, under such circumstances as here exist, to bar an inquiry into the fact of the perpetration of the fraud. It is clear that a court of equity, on the presentation of such a state of facts, would have enjoined appellant from interposing such a plea, and we see no substantial reason why the court in this form of action may not grant the relief which is so manifestly essential to the proper administration of justice between the parties.

All the evidence offered and heard in reference to the condition of the partnership accounts, except in so far as it goes to establish the simple fact of the existence of the partnership and that the property mentioned in the will was bought with partnership funds, is

incompetent. Such evidence is calculated to confuse the mind of the jury and draw it away from the sole issue of will or no will.

Judgment *reversed* on appeal and *affirmed* on cross-appeal of S. R. Ogden, with directions for further proceedings.

McHenry & Haynes, Little & Slack, W. N. Sweeney & Son, for appellant. G. W. Ray, Owen & Ellis, for appellees.

THOMAS JONES, ET AL., v. JOHN SHILETTO & Co.

Liability of Sheriff and His Sureties.

In case it is sought to hold a sheriff and his sureties liable for loss sustained because of the acceptance of an insolvent surety on a replevin bond the plaintiff must allege and prove two things, namely: Insolvency of the surety and damage to the execution plaintiff by reason of the acceptance of such insufficient security.

Pleading.

When it is sought to hold a sheriff and his sureties liable for damages sustained because of the acceptance of an insolvent surety on a replevin bond, facts must be pleaded showing such insolvency and showing that damages resulted to plaintiff. It must be alleged and proved that the execution defendant was solvent when the replevin bond was executed, and that during the time for which the power to enforce the judgment was in abeyance by reason of the execution of the replevin bond, the execution defendant became insolvent.

APPEAL FROM CAMPBELL CIRCUIT COURT.

April 15, 1880.

OPINION BY JUDGE HINES:

The appellees, having a judgment and execution against one Jordan, had execution placed in the hands of appellant, Jones, then sheriff, who permitted the debt to be replevied with one Wade as surety. Execution issued on the replevin bond against Wade, and was returned "no property found," and subsequently execution issued against Jordan and was returned in the same way. This action was then brought against the sheriff and his sureties in the official bond to recover the amount of the debt. The petition alleges these facts, and that Wade was insolvent at the time the replevin bond was executed, but makes no allegation as to the insolvency of Jordan, and charges that by reason of the sheriff accepting the insolvent security on the bond appellees were damaged in the amount of their debt. To this petition a general demurrer was interposed and overruled, and that ruling is first complained of as error.

The statute applicable to this question provides that the officer "and his sureties, or their representatives, shall be jointly and severally liable to the person injured, for any damage he may sustain by taking surety thereon who is not solvent when received."

It appears that to make out a cause of action in a case like this two things must exist, first, insolvency of the surety on the replevin bond, and, second, damage to the execution plaintiff by reason of the acceptance of the insufficient security. The fact of the insolvency of the surety and the facts showing that damage was sustained must be pleaded in an issuable manner. It is not sufficient to allege that the plaintiff suffered damage without stating facts going to show the court that damage did result, and to this end it must be alleged and proved that the execution defendant was solvent when the replevin bond was executed, and that, during the time for which the power to enforce the judgment was in abeyance by reason of the execution of that bond, the execution defendant became insolvent, otherwise there is nothing to show that any damage has been sustained. Without allegation and proof to that effect no recovery can be had. The court below should have sustained the demurrer to the petition.

The instruction to the jury should have followed the language of the statute as to the solvency of the surety in the replevin bond.

Wherefore the judgment is *reversed* and cause remanded with directions for further proceedings.

J. R. Hallam, for appellants. O. W. Root, for appellees.

JAMES W. WILLIAMS' ADM'R *v.* J. H. GATES.

Contract of an Intestate.

Where the sheriff makes a levy on property, and the execution defendant agrees, if allowed to keep it, that he will sell the same and pay over the proceeds to the sheriff for the holder of the judgment, and makes the sale but dies before the property is paid for, the administrator may not force the officer or the holder of the judgment to pay over such proceeds to him.

Levy on Property Creates a Lien.

If the sheriff holding an execution levies on personal property he has a lien, and such lien is not divested by an agreement by which the sheriff permits the defendant to hold and sell such property to pay such lien, and the officer and owner of the execution are not liable to the defendant or his estate for any part of such proceeds except such as exceed the same due such a plaintiff.

APPEAL FROM DAVIESS CIRCUIT COURT.

April 17, 1880.

OPINION BY JUDGE COFER:

During the life of the appellant's intestate the appellee, who was then sheriff of Daviess county, levied certain executions in his hands upon a lot of corn belonging to the intestate, but left it in his possession under the agreement that it should be sold privately and the price should be received by the appellee and applied to the satisfaction of the execution. The corn continued in the possession of the intestate up to the time of his death, after which the appellee delivered it to persons to whom it had been contracted before the intestate's death.

The appellant qualified as administrator and brought suit to settle the estate, after which the appellee collected a part of the price of the corn, and the appellant instituted a motion in the settlement suit to compel the appellee to account for the corn and to pay over to him that part of the price collected. The court overruled the motion and this appeal is prosecuted to reverse that judgment.

After suit for the settlement of an estate is commenced the assets become subject to the orders of the court in the administration of the trust; and we entertain no doubt of the power of the court, by summary proceedings, to compel any one who may thereafter come into possession of any part of the assets without the consent of the court to account for them, and that it is not necessary to resort to an independent action. A person so interfering is guilty of an invasion of the authority of the court, and becomes at once amenable to its process as for a contempt, and may be compelled to come in and manifest his right to the assets received by him. But in response to such process he may set up his claim to the assets in the same manner that he could have done if he had been sued in a separate action by the personal representative, and any defense that would have been good in such an action will be a good defense to the summary process of the chancellor.

Such a defense was set up in the response in this case. The agreement between the intestate and the appellee that the corn should be sold and the price paid to the latter to be by him applied to the satisfaction of the executions levied upon it by him was valid, and, if the appellee had been sued by the administrator for the conversion of the corn or for money had and received, the agreement of

the intestate would have been a good defense unless the amount received exceeded the amount due on the executions, which was not the case.

The levy created a valid lien on the corn and entitled the execution plaintiffs to have the proceeds of its sale applied to the satisfaction of their judgments, and there is no reason why the appellee should be required to pay it into court or to the appellant. If this were done the court would be compelled to recognize the lien of the execution creditors, and the appellee, having paid them, would be substituted to their rights, and the money would have to be immediately handed back to him; and if there be any part of the money that he has not actually paid over he has a right to apply it according to the agreement. If he fails or refuses to pay it over to the execution creditors, the court would no doubt have a right upon complaint to compel him to do so, but such was not the object of this proceeding.

The corn was sold and delivered to the purchasers before the suit to settle the estate was commenced, and hence its sale and removal, if wrongful, gave the administrator a right of action for its conversion, but there being no action then pending to settle the estate, such interference was no intrusion upon the jurisdiction and authority of the court, and the court had no right to inquire into it.

Wherefore the judgment is *affirmed*.

Williams & Powers, for appellant.

T. H. GARVIN *v.* L. J. F. BARREN, ET AL.

Notes Secured by One Mortgage.

Where two notes are secured by one mortgage, and by assignment become the property of different persons, a judgment on one of them may not be levied on the mortgaged property so as to affect the lien of the owner of the other note, and a purchaser at such a judicial sale takes the property subject to the lien of the holder of the other note.

APPEAL FROM HART CIRCUIT COURT.

April 20, 1880.

OPINION BY JUDGE HINES:

L. J. F. Barren executed two notes to Elisha Johnson, one for \$62 and the other for \$50, and to secure their payment made to Johnson a mortgage on certain personal property. One of these notes John-

son assigned to appellant and the other to Briggs. Briggs brought suit upon the note assigned to him, and having obtained judgment he had execution levied upon the mortgaged property, which was sold and purchased by A. J. Barren. Appellant afterward brought suit on the note assigned to him, sought to be substituted to the rights of Johnson under the mortgage, and had attachment levied upon the mortgaged property in the hands of A. J. Barren. The court below rendered personal judgment against L. J. F. Barren, but discharged the attachment, holding that A. J. Barren took title to the mortgaged property under his execution purchase. The correctness of that ruling is the only matter we need to consider.

"Generally a mortgagee cannot, upon a judgment recovered for the debt secured by a mortgage, levy the execution upon the mortgaged property, though it may be levied upon any other property of the debtor. Such a proceeding would amount to a foreclosure in a way not contemplated by the parties or provided for by the law. The levy would therefore be ineffectual, and would leave the mortgage as it stood before, subject to redemption. The mortgagee is just where he began." Jones on Mortgages, Sec. 1229. Such execution sales have been held by this court to be void. *Swigert v. Thomas*, 7 Dana 220; *Bronston v. Robinson*, 4 B. Mon. 142; *Mercer v. Tinsley*, 14 B. Mon. 220.

The liens secured by the mortgage in this case were of equal dignity, and the rights of the appellant cannot be taken away by such proceedings instituted by the other mortgagee or his assignee. Briggs' right to subject the property by execution to the payment of the debt was exactly that of any other creditor; that is, the purchaser at the execution sale takes the property subject to appellant's mortgage lien.

We see no objection to the exercise of jurisdiction by this court. The amount claimed and in controversy determines the question of jurisdiction, but if that were not true it is found that by calculating the interest on the principal up to the payment, adding it to the principal and subtracting the payment, there is left over more than \$50, exclusive of interest and cost.

Judgment *reversed*, and cause remanded with directions for further proceedings.

Edwards & Seymour, for appellant.

Isaac T. Woodson, for appellees.

MARTIN S. MATTINGLY *v.* JAMES W. SLAUGHTER.**Partnership—Set-Off.**

Where the individual members of a partnership are liable to an administrator on a constable's bond, and the partnership as such hold a claim against such estate, the one claim may be set off as against the other. It can make no difference that the claim of the administrator is against individual members of the firm.

APPEAL FROM DAVIESS CIRCUIT COURT.

April 20, 1880.

OPINION BY JUDGE HINES:

J. M. Mattingly and Geo. D. Mattingly, partners under the firm name of J. M. Mattingly & Son, brought suit against the administrator of McKee on an account due from McKee to the firm, and pending the suit, March 10, 1876, transferred for valuable consideration, by written endorsement on the petition, the claim to appellant, Martin S. Mattingly. Suit progressed in the name of Mattingly & Son, judgment was obtained against the estate and execution returned "no property." Appellant then instituted this suit against the administrator of McKee and the surety in his administration bond, charging a devastavit. The answer of the administrator denies a wasting of the estate and pleads a set-off, which he claims to arise out of the following state of facts: That there came to the hands of the administrator a number of small accounts, which were by him placed in the hands of one, Stinnell, constable, for collection; that J. M. Mattingly and Geo. D. Mattingly were sureties on the bond of the constable; that the constable failed to collect and pay over the said claims; that after demand made of Stinnell, and after the assignment to appellant of the claim sued on, appellee, as administrator, brought suit against Stinnell and his bondsman, Geo. D. Mattingly (J. M. Mattingly having died in the meantime) and obtained judgment, which he asks to have set off against appellant's demand. It further alleged and showed that the liability of Stinnell and the sureties on his bond, J. M. and Geo. D. Mattingly, had accrued before Mattingly & Son had assigned the claim against McKee's estate to appellant. The time within which the constable should have collected or accounted for the claims placed in his hands by the administrator of McKee had expired, and demand had been made of the constable by the administrator.

The liability of Stinnell, J. M. & Geo. D. Mattingly, to the administrator of McKee was joint and several, and subsisting at the time

the assignment was made by Mattingly & Son to appellant. The principal and the sureties were each and all liable to the administrator for the claims in the hands of the principal, and unaccounted for. The fact that the claim was against J. M. & Geo. D. Mattingly upon an individual liability assumed by each, instead of upon a partnership liability, can make no difference. In either case they are both jointly and severally liable for the default of the constable. Section 377 of the code, which provides for the setting off of judgments, the one against the other, having due regard to the equities of the parties, does not apply to a case like this. That provision of the code appears not to have been intended to apply to cases where there was no right of set-off at the time of the assignment or at the time of the notice of the assignment, but to cases where the party pleading the judgment acquired his rights subsequent to the institution of the action in which he proposes to plead it.

The case of *Pheiffer v. Harris*, 11 Bush 400, is a case where the right to set-off did not exist at the time of the institution of the action, or at the time the assignment was made, and is not then conclusive of this case. The legal right to a set-off as against the individual members of the partnership cannot be defeated by reducing the claim against the members of the partnership to judgment, nor by the death of one of the partners before judgment. Appellant stands in the same attitude as his assignors would have stood if there had been no assignment of the claim and no dissolution, by death, of the firm of Mattingly & Son. If that firm had remained intact and the administrator had obtained judgment against Geo. D. Mattingly on the constable's bond, omitting to sue J. M. Mattingly, the plea of set-off would have been good in equity as against the partnership claim of Mattingly & Son, because of the joint and several liability of the members of the firm, and because if Geo. D. Mattingly had been compelled to pay the whole of the judgment against the constable he would have been entitled to contribution against his partner, J. M. Mattingly. This liability of the members of the firm of Mattingly & Son is independent of the solvency or insolvency of the constable. That is a matter of no concern to the administrator. He has the right to look to any or all of the parties to the bond, as he may elect.

Judgment affirmed.

Riley & Walker, for appellant.

R. H. & E. P. Taylor, for appellee.

JAMES M. SMITH *v.* W. T. TEVIS, ET AL.**Construction of Terms of a Will.**

The words, "the children surviving," as used in a will, mean the children surviving at the death of the testator.

APPEAL FROM MADISON CIRCUIT COURT.

April 20, 1880.

OPINION BY JUDGE PRYOR:

The clause of the will under which the devisee claims, vests her with title. The words, "the children surviving," in the first clause of the will mean the children surviving at the death of the testator. The appellee took an absolute estate under the will, and so far as her interest is concerned the other devisees were not necessary parties.

Judgment affirmed.

T. J. Scott, for appellant. W. B. Smith, for appellees.

DANIEL BRYAN, ET AL., *v.* THOMAS G. LOWRY.**Construction of Will.**

A provision in a will directing that at the death or marriage of the widow the whole estate should be sold and the money received equally divided among his children, or such of them "as may be then living, taking care to give to the representatives of such as are dead, if such should be the case, a child's part," means that all his children living at his death were made legatees and took a vested interest, subject to be defeated by their death before the death or marriage of their mother, in which case the representatives of such as died took as alternative legatees, and not as heirs or distributees of the deceased parent.

Election of Legatees.

Those entitled to the proceeds of land devised to executors to be sold may, before a sale, elect to take the land and thus defeat the power of sale.

APPEAL FROM JESSAMINE CIRCUIT COURT.

April 22, 1880.

OPINION BY JUDGE COFER:

The testator directed that at the death or marriage of his widow his whole estate should be sold by his executors for cash, and that

the money should be equally divided among his children, or such of them "as may be then living, taking care to give to the representatives of such as are dead, if such should be the case, a child's part."

Counsel contends that the land, having been directed to be sold, is to be treated as money, and that the word "representatives", when used with reference to money, is equivalent to the phrase "personal representatives", and in this will is a word of limitation, and not a word of purchase; and from this he argues that the children of the testator took an absolute estate, and that their children cannot take anything as legatees under the will.

That the word "representatives", when used with respect to personalty, if its meaning is not restricted by the context, is to be understood to refer to the personal representatives, must be conceded. But we think its meaning is thus controlled in this case. The bequest was to the testator's children who should be living at the death or marriage of his widow, and to the representatives of such as should be dead. All his children living at his death were legatees, and took a vested interest, subject, however, to be defeated by their death before the death or marriage of their mother, in which case the representatives of such as so died took as alternative legatees, and not as heirs or distributees of the deceased parent.

The word "representatiyes" was not used to indicate the estate or interest given to the testator's children, but to describe a class of persons who were to become legatees in the room and stead of such of the first takers as might die before the time appointed for the division of the estate. Thus considered, this case is not materially different from that of *Robb v. Belt*, 12 B. Mon. 643.

In that case the court said that "if it was the intention of the testator to give to each of his children an absolute interest in remainder, unaffected by any death that might occur before the time of enjoyment fixed by the devise, it would have been sufficient to have directed that, in either of the events mentioned, his estate should be equally divided among his eight children, and the additional words, or the heirs lawfully begotten of their bodies, would have been useless".

For the same reason, if it was the intention of this testator to give to his children an absolute interest in his estate "unaffected by any death that might occur before the time of enjoyment fixed by the bequest", it would have been sufficient to direct that, in either of the events mentioned, his estate should be divided between his children

and the words, "taking care to give to the representatives of such as are dead" a child's part, were wholly unnecessary.

It is true that the land is to be regarded for many purposes as converted into money by the will, and that the land was not devised to the children of the testator or to their representatives; but it is equally true that in a case like this those entitled to the proceeds of land devised to executors to be sold, may, before a sale has been made, elect to take the land and thus defeat the power of sale. That has been done in this case, and perceiving no error in the judgment it must be affirmed.

*J. S. Branaugh, W. C. P. Breckinridge, for appellants.
Houston & Mulligan, M. T. Lowry, for appellee.*

ADAIR BOYD *v.* WILLIAM MERCER.

Deed Made by Deputy Sheriff.

A deed made by a deputy sheriff should be made in the name of his principal, but when made in the name of the deputy it is not invalid for that reason. Such a deed is admissible in evidence to show that the grantee entered and held under claim of title, and is competent evidence of title.

APPEAL FROM MUHLENBURG COURT OF COMMON PLEAS.

April 26, 1880.

OPINION BY JUDGE COFER:

The deed made by Eaves, deputy sheriff, was not only admissible as evidence that the grantee entered and held under claim of title, and of the extent to which he claimed, but was competent as evidence of title.

In *Winslow v. Austin*, 5 J. J. Marsh. 408, a deed was made by a deputy marshal in his own name just as this was made by the deputy sheriff. The act of congress gave to the marshals and their deputies the same powers in executing the laws of the United States as was possessed by sheriffs and their deputies in the several states, in executing the laws of the states respectively.

The court, after full consideration, held that the deed was valid on the ground that a deed made in like manner by a deputy sheriff would have been valid. In *Young v. Smith*, 10 B. Mon. 293, the case of *Winslow v. Austin*, is referred to with approval, and we are

not aware of any subsequent case by which the doctrine of that case has been in the least contravened or shaken.

Counsel seem to suppose that there is something in the language of this court in *Talbott's Devisees v. Hooser*, 12 Bush 408, which may have that effect, but we think otherwise. We there said that "Whatever official act is done by a deputy should be done in the name of his principal". More was said to the same effect, but we did not say or mean to be understood as intimating that a failure to do the act in the mode we deemed most appropriate would render it void. We there held the act of the deputy valid, although not done in the mode indicated in the opinion as the correct one.

The Act of 1792, referred to in *Winslow v. Austin* required the deputy sheriff to subscribe, as well his own, as his principal's name, under a penalty of \$40. This made it the duty of the deputy to act in the name of his principal, but the court expressly held that the omission to perform that duty did not render the act nugatory. So in *Talbott v. Hooser* we said the deputy should act in the name of the principal, but we held valid an act not so done.

What we have said in regard to the acts of the deputy not done in the name of the principal is equally applicable to the certificate of the deputy clerk.

Judgment *reversed* and cause remanded for a new trial upon principles not inconsistent with this opinion.

Chas. Eaves, William Lindsay, for appellant.

Roark & Hay, for appellee.

LEWISTON COOPER v. LEWIS COLLINS' EX'R.

Makers of Promissory Note.

Where directors of a corporation or trustees execute a note by signing their individual names to it, not as trustees, they become individually liable thereon to the owner of such note; and whether they may discharge such liability out of the trust estate is not a matter of interest to the owner, but is one to settle in the settlement of the trust.

APPEAL FROM MASON CIRCUIT COURT.

April 27, 1880.

OPINION BY JUDGE PRYOR:

This court, in a manuscript opinion rendered during the present term and marked for publication, passed upon the identical question

raised in this case. It was the case of *Pack v. White*, 78 Ky. 243, as published, from the Scott Circuit Court. The writing read: "We, the directors of The Big Eagle & H. Turnpike agree to pay," and signing their individual names. The court held them individually liable. The paper in the present case is the individual obligation of the parties whose names are signed to it, and no question of construction as to the intention should be indulged in. Either fraud or mistake should be alleged and established before the liability of the obligors can be changed from a personal to an official character. In this case there is no evidence of any fraud or mistake, and, as the writing stood, the court could do no less than render a personal judgment.

It was not necessary that this action should await the termination of the settlement of the accounts of these parties as the trustees of Pheister. When they pay this money, if they have applied it to the benefit of the trust estate, they will be entitled to a credit in the settlement of their accounts. Nor is there anything in this record showing that a judgment has not been rendered in the action relating to the trust. The liability of the appellant to the appellee, however, has no connection with it, so far as the appellee is concerned. It may be necessary to establish the claim as a charge against the trust fund, and if so, this is the duty of the appellant and not of the appellee.

Judgment affirmed.

Wadsworth & Sons, for appellant.

Barbour & Cochran, for appellee.

FREDERICK EHRLMAN ?'. FRANK STOLL, ET AL.

Statute of Limitations.

The law of this state governs when a suit is brought here on a note executed in Ohio, as to whether our statute of limitations applies.

Law of the Place.

Where a note is made in Ohio its legal effect must be determined by the law of that state.

Negotiability of Note.

Where the statute provides that notes "made payable to any person or order, or to any person or bearer, or to any person or assigns, shall be negotiable by indorsement thereon," a note made payable to the order of a named person is the same as if it had been payable to him or order, and is negotiable.

APPEAL FROM CAMPBELL CHANCERY COURT.

April 27, 1880.

OPINION BY JUDGE COFER:

The statute of limitations in this state must govern the decision of this case. More than six years elapsed after the date of the last credit on the note before this suit was commenced, and the obligor had been dead more than five years, so that the only question in the case is whether the instrument sued upon is to be treated, for the purpose of applying the statute of limitations, as a bill of exchange.

The note was made in Ohio, and its legal effect must be determined by the law of that state. The statute provides that notes "made payable to any person or order, or to any person or bearer, or to any person or assigns, shall be negotiable by endorsement thereon", and that nothing therein contained "shall be construed to make negotiable any such bond, note or bill of exchange drawn payable to any person alone, and not drawn payable to order, bearer or assigns."

The note sued on is payable to the order of Frederick Ehrman, which is the same as if it had been payable to him "or order", and is therefore within the statute.

Our statute makes it necessary, in order to place a promissory note on the footing of a foreign bill, that the note shall be payable at and discounted by an incorporated bank. But the Ohio statute does not require either, and makes the note negotiable without endorsement, the only thing necessary to that end being that it shall be payable to order, to bearer or to assigns.

Judgment affirmed.

J. Crentz & Son, for appellant. J. R. Hallam, for appellees.

MARY L. STEMBRIDGE, ET AL., v. JAMES A. STEMBRIDGE, ET AL.

Validity of Guardian's Bond.

Dating a guardian's bond is not necessarily essential to its validity; but recitals in the order of appointment that a bond was given and of the name of the surety are necessary and material to such validity, and where there is a conflict in the bond and order as to the date of a bond the court will rely upon the order, and not the bond, to ascertain the date of the bond.

Liability of Guardian's Bondsmen.

The fact that the order appointing a guardian recites that the bond was executed on a day different from that shown in the bond, and recites the appointment of a guardian of two infants, while the bond is as guardian of one only, will not render such a bond invalid, nor release said guardian and his bondsmen from liability thereon.

APPEAL FROM DAVIESS CIRCUIT COURT.

April 27, 1880.

OPINION BY JUDGE COFER:

This was a suit on what purports to be the official bond of Jas. A. Stembridge, guardian of Mary L. Stembridge. The administrator of the surety defended on the ground that the bond had never been accepted or approved by the county court, and consequently never became binding upon his intestate.

The order of the county court bears date February 13, 1871, and purports to appoint Jas. A. Stembridge as guardian of Mary and Lorena Stembridge, infant orphans, under 14 years of age, of W. M. Stembridge, "Wherefore he (Jas. A. Stembridge) took the oath required by law, and executed bond with G. W. Stembridge as his surety conditioned according to law."

The bond sued upon is in the usual form, and was signed by G. W. Stembridge, but bears date on the 15th of February, two days subsequent to the date of the order. The date is not an essential part of the bond, and its only effect in this case is as evidence conducing to prove that it was in fact executed on the day it bears date, and not on the day the order was made. But the order recites that a bond was executed on the day the order was made, and there being no claim that more than one bond was in fact signed, we are brought to the point of deciding which is to be regarded as true, the recital in the order that the bond was executed on the day the order was made or the date of the bond. In choosing between them we cannot hesitate to prefer to rely upon the order. The order is the act of the court recorded by the clerk and signed by the judge; dating the bond was the act of the clerk alone.

The recitals in the order that a bond was given and of the name of the surety were necessary and are material, while dating the bond was not necessary to its validity. That the order recites the appointment of a guardian of two infants, Mary and Lorena, and the bond is "as guardian to Mary L. Stembridge", is not deemed at all

important. There was, in fact, but one person for whom a guardian was appointed, and that person was named Mary Lorena Stembridge. But if there were two the circumstance that the ward was called Mary in the order and Mary L. in the bond would not affect the decision of the case.

There is nothing in the case of *Fletcher v. Leight*, 4 Bush 303, inconsistent with this conclusion. That case was decided on the ground that one of the sureties named in the order as such did not sign the bond, and all that was decided was that this omission released those who did sign it.

Judgment *reversed* and cause remanded with direction to render judgment against Jas. A. Stembridge, the administrator of G. W. Stembridge, for the amount which remained in the hands of his principal.

Little & Slack, for appellants. Geo. W. Jolly, for appellees.

AMANDA COONS, ET AL., v. J. A. COONS' ASSIGNEE, ET AL.

Husband and Wife.

A wife agrees with her husband that he might receive and use the money coming to her under her father's will on condition that it was to be used at a future time in paying for a designated tract of land, in which she was to be interested to the extent of such payment; but the father left a will giving said designated land to the husband, burdened with the stipulation that he should pay \$60 per acre into the general fund of the estate. Also, he received from his wife \$4,000 coming from her father's estate. Some years thereafter the husband made a deed to this land, in which his wife did not join, to a trustee for the payment of debts, reserving homestead, dower and the interest of his wife to the extent of the \$4,000, advanced by her. There was no agreement that the husband would convey to the wife any interest in the land. Under these facts it was held that the wife could claim nothing more than to be a creditor of her husband to the extent of \$4,000, and that she took no interest in the land as against his creditors.

APPEAL FROM FAYETTE COURT OF COMMON PLEAS.

April 30, 1880.

OPINION BY JUDGE HINES:

Assuming the allegations in the answer and cross-petition of Mrs. Coons to be true, she agreed with her husband, after her marriage

in 1862, that he might receive and use the money coming to her under her father's will, on condition that it was to be used at some subsequent time in paying for a designated tract of land in which she was to be interested to the extent of the payments thus made. At the time this agreement was made J. A. Coons and wife knew that the father of J. A. Coons had made a will in which he had given the "Young place" to J. A. Coons, burdened with the stipulation that he was to pay \$60 per acre into the general fund of the estate, and this is the land in reference to which the agreement between Coons and wife was made.

Subsequent to this agreement and some six years after J. A. Coons had received \$4,000 from the estate of his wife's father, the father of Mrs. J. A. Coons died, leaving by his will the "Young place" to J. A. Coons upon the condition above stated. J. A. Coons and wife were living upon the "Young place" at the death of the father of J. A. Coons, and continued to reside thereon. In 1877, eight years after the death of his father, J. A. Coons made a deed to this land, in which his wife did not join, to a trustee for the payment of debts, reserving homestead, dower and the interest of his wife to the extent of the \$4,000 thus advanced by her. There is no allegation in the answer and cross-petition of Mrs. Coons that there was any agreement that her husband would convey to her any interest in the land, nor was any conveyance ever made. In this suit to distribute the estate of J. A. Coons under the deed of trust, the trustee asks to be instructed as to his duties and Mrs. Coons asserts her claim to four-ninths of the "Young place." The court below sustained a demurrer to the answer and cross-petition of Mrs. Coons, and from that judgment this appeal is taken.

Under the adjudications in this state Mrs. Coons can claim nothing more than to be a creditor of her husband to the extent of the \$4,000 received by him from her father's estate. She took no interest in the land itself as against creditors. But as on this appeal we are called upon to decide only as to the interest of Mrs. Coons in the land, we express no opinion as to whether the facts set up by Mrs. Coons, if properly presented, would establish her claims as against creditors.

Sec. 19, Art. 1, Chap. 63, Gen. Stat., was intended to destroy resulting trusts, and there appears no more reason why there should be a resulting trust in favor of the wife, as against creditors, when the title is acquired by will than when it is acquired by deed. It is,

as to the party furnishing the remedy, in either case an acquisition of title by purchase, to which the statute was evidently directed.

Judgment affirmed.

W. S. Darnaby, for appellants. G. W. Darnall, for appellees.

NAT KERSEY v. COMMONWEALTH.

Criminal Law—Rape.

Even an error of the court in instructing the jury that the offense of rape is punished by imprisonment from one to five years, instead of not less than five nor more than twenty years, is not prejudicial to a defendant where the jury disregards the instruction by fixing the punishment at seven years.

APPEAL FROM JESSAMINE CIRCUIT COURT.

April 30, 1880.

OPINION BY JUDGE COFER:

We do not perceive any valid objection to the instruction given by the court. It was conceded in the argument that the word "rape" was preceded in the instruction as given by the word "attempt", which the clerk has omitted in making the transcript.

With that addition we see no objection to the instruction for which the judgment ought to be reversed. It was suggested that the clerk had also made a mistake in copying "from one to five years" instead of "not less than five nor more than twenty years", the time fixed by the statute; and from the unusually careless and unskillful manner in which the whole transcript is copied and the improbability that so gross a mistake was made by the court, we think it quite probable the suggestion is true. But as the clerk has certified it to be a true copy, and the appellant's counsel was unable to admit that it was not, we are compelled to treat the clerk's certificate as true.

We do not, however, regard the error as prejudicial to the appellant. It is true the jury disregarded the instruction by fixing the punishment at seven years. But as the law, if properly given, would have authorized a much longer period of confinement, he cannot have been prejudiced. On the contrary, the fact that one year was fixed as the minimum was prejudicial to the commonwealth, because it was calculated to impress the jury with the notion that the law regarded the offense with which the appellant was charged with much less abhorrence than it does.

When all the instructions are considered together the particularity with which the court indicated the acts necessary to complete the crime charged was to the appellant's advantage, rather than his detriment. The court was particular to impress the jury that some act of actual violence amounting to an assault must be proved before they were authorized to convict.

Nor did the instruction indicate to the jury that they were to find the necessary criminal intent from any or all of the overt acts mentioned in it. The overt acts proved by the attending circumstances were sufficient to authorize the jury to find that the intent existed, but they cannot, as reasonable men, have been misled by the instruction to suppose that it was not necessary that they should find that the criminal intent existed at the time of the overt act.

The judgment is *affirmed*.

Morton & Parker, for appellant. Hardin, for appellee.

A. JONES, ET AL., v. JOHN C. MARSHALL.

Motion to Paragraph a Petition.

When a petition attempts to set forth two causes of action, one on a bond and one on the covenants in a deed, a motion to separate it into two paragraphs of complaint should be granted.

Sufficiency of Paragraph of Petition.

When there has been an attempt to set forth two causes of action in one paragraph, or when only a part of the facts in one are necessary to a cause of action set up in another, the pleader should not be permitted by "making such facts in the first paragraph as are necessary to the cause of action in the second paragraph" part of the latter by that character of general reference to the first.

APPEAL FROM MERCER CIRCUIT COURT.

May 1, 1880.

OPINION BY JUDGE COFER:

The rule to paragraph the petition was properly awarded. As originally presented the petition attempted to set forth two causes of action, one on the covenant in the deed, the other on the bond. In paragraphing the appellant struck from the petition so much of it as sought judgment on the covenant of warranty, thereby leaving so much as sought to recover on the bond as the cause of action in the first paragraph.

It was attempted in the amended petition to set up a cause of action on the covenant of warranty by making "all the averments of the first paragraph necessary" to a cause of action part of the second paragraph. This could not be done without indicating what averments the pleader deemed necessary.

When all the facts in a preceding paragraph are necessary to a separate cause of action set up in a succeeding paragraph, they may be incorporated into the latter by referring to the former and making its allegations a part of the latter. This shortens the pleadings without tending to laxity or confusion. But when there has been an attempt to set forth two causes of action in one paragraph, or when only a part of the facts in one are necessary to a cause of action set up in another, it would produce great perplexity and confusion to allow the pleader by "making such facts in the first paragraph as are necessary to the cause of action in the second paragraph" part of the latter by that character of general reference to the first.

All experience has demonstrated that perspicuous pleading greatly facilitates the correct administration of justice, and the rules of pleading should not be so construed as to allow the court or the adverse party to be in doubt as to the precise facts upon which the pleader relies, or to compel the adverse party to decide at his peril which of the facts alleged in one paragraph are material to a cause of action set up in another. Both prolixity and vagueness in pleading should be avoided, but when this cannot be done brevity should be sacrificed to certainty. We are therefore of the opinion that the court did not err in sustaining the demurrer to the second paragraph.

The first paragraph sought to recover on the bond, and when the nature of the covenant therein contained is considered there does not seem to be any serious difficulty in disposing of the question raised by the demurrer to that paragraph.

The appellee, with others, covenanted that Harriett Robards, then an infant, should convey her interest in the lot as soon as she attained her majority. She failed to convey when she reached that age, and such failure on her part was a breach of the appellee's covenant.

There is another covenant that the appellant's ancestor should retain possession of the lot until Harriett should convey. What effect that covenant may have, or whether a cause of action accrued to the

covenantee as soon as she arrived at the age of twenty-one years and failed to convey, or until some damage had resulted from her failure, are questions we need not consider. She had title to a part of the lot, as is shown by the bond, and if the appellant or his father was compelled to buy that interest in order to secure her title there was both a breach of the appellee's covenant and a resulting damage to be measured by the value of her interest in the lot at the time she conveyed it, not, however, to exceed the penalty of the bond.

Wherefore the judgment is *reversed*, and the cause remanded with directions to overrule the demurrer to the first paragraph of the petition.

Bell & Willson, Thompson & Thompson, for appellants.

Russell & Helm, for appellee.

THOMAS S. SCHWARTZ *v.* DAVID WILSON, TRUSTEE, ET AL.

Construction of Will.

The object of construction of the terms of a will is to arrive at the intention of the testator.

Meaning of Words Used in a Will.

Where in a will the testator provided that "the children of my daughter Margaret have one-half a share with the rest of my heirs," it was held to be the obvious intention to give to each of his children twice as much as was given to each of his grandchildren who represented their mother.

APPEAL FROM FLEMING CIRCUIT COURT.

May 1, 1880.

OPINION BY JUDGE PRYOR:

The deceased daughter, Margaret Graves, had two children, and the deviser had, at the date of his will, several children living. His purpose was to give to each of his grandchildren half as much as he gave to each of his children. "The children of my daughter Margaret have one-half a share with the rest of my heirs." He designates the whole as a class under the term "heirs", and says, in substance, my two grandchildren shall have half as much as my children or the rest of my heirs. The object of construction is to arrive at the intention of the testator, and it is obvious from the reading of this will that the purpose of the deviser was to give to his own chil-

dren twice as much as was given to each of his grandchildren, who represented their mother.' In the division between my heirs my two grandchildren are to have half as much as the rest of my heirs. Each heir takes an equal share until you come to the grandchildren, and they take each a half of a share.

The devisor denominated all of his children and grandchildren as his heirs. Say he had six children and two grandchildren, this made eight heirs in all, and by giving the two heirs who were his grandchildren half as much as he gave the other heirs you have seven full shares, the children getting a full share each and the grandchildren half a share each.

Judgment affirmed.

Andrews & Sudduth, for appellant.

Cole & Davis, for appellees.

JOHN D. MARCH v. A. C. MARCH'S ASSIGNEE.

Fraudulent Conveyance of Real Estate.

A deed in consideration of love and affection from the father to the son is fraudulent as to pre-existing debts.

Petition to Set Aside Conveyance.

It is not enough to allege in a petition to set aside a conveyance that the consideration for such conveyance was love and affection, and that the grantor was indebted at the time, but the amount and manner of indebtedness and to whom, and that it was unpaid when the petition was filed, must be alleged.

APPEALS FROM BOURBON CIRCUIT COURT.

May 4, 1880.

OPINION BY JUDGE PRYOR:

These cases will be considered together. If the want of diligence manifested in this case is permitted to be relied on as an excuse for not making the defense now made there would be no end to litigation. Counsel and client must both be presumed to know when the term of court is to be held at which the case is to be tried, and a want of, or recollection as to such a fact can afford no excuse whatever.

The one may have been relying upon the other; still, both are in fault in not knowing when the appearance of the defendant is to

be made. If this precedent is established the want of recollection as to the day on which the case is to be tried would be ground for an injunction, or an absence of recollection as to any particular fact favorable to the party against whom a judgment has been rendered. The failure to know or remember the court in which the action is pending shows a degree of laches that will prevent relief. That the assignee in bankruptcy can maintain an action in the state court to annul the conveyance, if fraudulent, admits of no doubt, but the question in this case is, Does the petition on the facts alleged present a cause of action?

A deed in consideration of love and affection from the father to the son is fraudulent as to pre-existing debts, and if the allegations of the petition are sufficient as to the indebtedness the judgment by default was proper. There is no allegation of the existence of any debt by the grantor at the date of the filing of the petition, and how the chancellor is to sell the land without knowing what debt it is to be sold to satisfy cannot well be understood. That he was indebted at the time of the conveyance may be true, and still these debts may have been satisfied. But to whom he was indebted and in what amount the petition is silent, and the chancellor left to grant relief by a sale of the land without any evidence of the existence of a single debt, or its amount.

There is no reason why the assignee for creditors should be given a greater latitude in pleading than the creditor himself. If a creditor of the bankrupt had sued alleging the voluntary conveyance by the latter, and that the grantor was indebted at the time to the plaintiff, without alleging amount and manner of indebtedness and that it was unpaid, no judgment by default could be rendered selling the land, as neither the amount of the indebtedness or its existence appears on the face of the petition. This conveyance, if debts existed at the time, may have been fraudulent as to them, and not to debts subsequently made. To allege simply an indebtedness and fraud to avoid payment without anything more will not authorize a recovery.

Judgment in case No. 1 is *reversed*, and in case No. 2 is *affirmed*, and cause remanded for further proceedings.

Ross & Kennedy, for appellant. T. T. Foreman, for appellee.

COMMONWEALTH, ET AL., v. JAMES D. COLE, ET AL.

Suit Maintained by Town.

Where an act authorizes a town to sue in the name of its trustees, and a suit is brought, it is the town suing and not the trustees, and their resignation will not stop such litigation or divest the corporation of any right it has.

APPEAL FROM HARDIN CIRCUIT COURT.

May 6, 1880.

OPINION BY JUDGE PRYOR:

The act incorporating the town of Elizabethtown authorized that corporation to sue in the name of the trustees, and by the ruling in this case, although the corporation still exists, it is not permitted to maintain the action. The right to recover is in the corporation, and the trustees having authorized the action there is no reason for denying a recovery if warranted by the facts. It is the corporation suing, and not the trustees, and their resignation does not stop the litigation or divest the corporation of the right to its property and to recover it of those who have it in their possession, or who, owing it, refuse to pay.

The judgment is *reversed* and cause remanded with directions to proceed with the case. The plea of abatement is not good.

J. P. Hobson, for appellants. William Henry, for appellees.

JAMES B. ROBINSON v. COMMONWEALTH.**Criminal Law—Instruction.**

A defendant charged with murder, but convicted only of manslaughter is not prejudiced by an instruction in regard to murder.

APPEAL FROM WOODFORD CIRCUIT COURT.

May 6, 1880.

OPINION BY JUDGE COFER:

Waiving a discussion of the question whether the former conviction of the crime of manslaughter was a bar to any further prosecution of the crime of murder, we are of the opinion that the appellant's rights were not prejudiced by the refusal of the court to sustain his plea of former acquittal of the crime of murder. If he had been

found guilty of murder the question would deserve grave and careful consideration, but having been found guilty of manslaughter only, and his punishment fixed at the shortest time allowed by the statute, we are unable to understand how the instructions in regard to murder can have prejudiced him.

Judgment *affirmed*.

Porter & Wallace, for appellant. P. W. Hardin, for appellee.

KENTUCKY CENTRAL RAILROAD *v.* THOMAS PATTON.

Negligence.

It is negligence for the employes of a railroad company operating a train to signal the train to move on, when a horse is within three or four feet of the cars, even though the cow-catcher has passed the horse without injuring him.

Bill of Exceptions.

The Court of Appeals will not reverse on account of an erroneous instruction where the record fails to show that any objection or exception was taken to the giving of such instruction.

APPEAL FROM FLEMING CIRCUIT COURT.

May 6, 1880.

OPINION BY JUDGE HINES:

The only grounds of complaint prosecuted by the motion for a new trial and the assignment of error are that the verdict of the jury is against the evidence, and that the court erred in giving instructions Nos. 1 and 2.

The question of negligence and as to the value of the horse were the only questions submitted to the jury, and their finding upon them will not be disturbed unless it is flagrantly against the evidence. Such is not the case here. The jury were authorized from the evidence of appellant and from the statement by the fireman alone to find negligence. Although the cow-catcher had passed the horse without injuring him, it was negligence to signal the train to move on when the horse was within three or four feet of the cars. But for this the slackened speed of the train might have permitted the horse to escape without injury.

The instructions appear to be substantially correct, but if they were not correct we could not reverse on account of any error in

them, because the code requires both an exception and an objection to instructions given on the motion of the adverse party, and here there was no objection. *Loving v. Warren County*, 14 Bush 316.

Judgment affirmed.

J. W. Bryan, for appellant.

W. J. Hendrick, John P. Nowell, for appellee.

WILLIAM BRYANT v. R. H. CRITTENDEN.

[Abstract Kentucky Law Reporter, Vol. 1—59.]

Release from Capias.

A motion for discharge from a capias, though irregular and informal, is sufficient to give the court jurisdiction, especially where the plaintiff attended by his counsel at the time the motion was heard and no objection was made as to such proceeding.

Jurisdiction of a Court.

Where a notice has been given and a judgment rendered by a court having jurisdiction, although the judgment may be premature, it is not void but merely erroneous.

APPEAL FROM JEFFERSON CIRCUIT COURT.

May 25, 1880.

OPINION BY JUDGE PRYOR:

We feel compelled to adhere to the conclusion reached in the former opinion. That the justice of the peace had jurisdiction to discharge an insolvent debtor is conceded, and the only ground relied on for a reversal is that the statute was not followed, and therefore the justice never acquired jurisdiction. The notice to the plaintiff in the execution must be regarded as a conformance with the statute.

This notice is to the effect that the appellee would move to be discharged from custody on a certain day at the office of McCarty, a justice of the peace in the city of Louisville, the office being on Preston street, near Walnut; that he is held in custody by virtue of a capias in the above styled case. An affidavit is also made that the party in custody has no property, real or personal, and no debts owing subject to the demand. This should be regarded as sufficient after trial and the discharge, and, although informal, cannot be held void. The plaintiff in the execution was notified and present by

counsel in the one case at the time it was heard. There was no objection made to the proceeding but the trial progressed resulting in the release of the prisoner from custody.

It is said, however, in the one case that the notice was insufficient, and the judgment on that account should be held void. The want of a summons or notice would render all subsequent proceedings a nullity; but where a notice has been given and a judgment rendered by a court having jurisdiction, although the judgment may be premature, it is not void but merely erroneous.

This court will presume that the two justices heard the case and determined whether the debts due Crittenden were subject to the payment of this claim. The only party to be affected by the discharge was the plaintiff in the execution, and we find no case where a judgment prematurely rendered in cases involving a mere individual liability are held void, if it also appears that the parties in interest had been notified. That the case is to be heard at the courthouse is merely directory and cannot vitiate the proceedings.

The only question of difficulty in the case is as to the identity of the judgment for which the appellee was placed in the custody of the jailer. The petition fails to state it, and also the order releasing the appellee from custody. It appears, however, that it was an execution in favor of the appellant, and the presumption in the absence of proof to the contrary must be that it is the same judgment for which the second capias issued. In fact, the proof on the motion to quash shows that it is the same debt, and the only question made in the case is as to the jurisdiction of the justices to order the release.

A judgment on a defective petition, or on a petition in which no cause of action is set forth is not void if the court had jurisdiction to hear the case, or to render a judgment similar to the one complained of. It seems to us the only question in this case is,—Had the justices the jurisdiction to discharge parties in custody by virtue of a capias, etc.? An affirmative inference settles the question, however informal the proceeding may have been, if the adverse party had notice of the proceeding.

Judgment *affirmed*.

Alexander, Baker & Reid, for appellant.

G. C. Wharton, for appellee.

R. J. MEYER v. J. C. WRIGHT.

[Abstract Kentucky Law Reporter, Vol. 1—68.]

Partnership.

Merely being joint owners of real estate and each agreeing to make certain improvements thereon does not constitute such owners partners.

Money Borrowed by One Joint Owner of Real Estate.

Where real estate is jointly owned by two persons neither is personally bound by the acts of the other when not partners, and where one loans money to one of them, the money not even being shown to have been used to improve the property solely on the statement of one of the joint owners that they are partners, the other is not liable for such debt.

APPEAL FROM JEFFERSON COURT OF COMMON PLEAS.

May 27, 1880.

OPINION BY JUDGE PRYOR:

It is well established from the proof in this case that no partnership existed between the appellant and Faulkner. That the latter purchased out the interest of Fields in the mill property and undertook to make certain improvements on the one hand, and the appellant to make certain expenditures on the other, is made to appear, but neither agreed to become bound for the acts of the other; and while the improvements made enhanced the value of the common estate, it by no means follows that such a result made one liable for the acts of the other or created a partnership, so as to fix a liability on Meyer for the expenditures made by Faulkner. It is not even shown in this case that the money borrowed was invested in improving the mill property, and no act on the part of Meyer induced the loan to Faulkner, or authorized the appellee to infer that a partnership existed between them. The two agreed to improve the property, one to contribute as much as the other, and Meyer swears that no partnership existed. As between the two no such relation was created, and no act of Meyer led the appellee to believe they were partners.

The signing of the receipt acknowledging the delivery of the goods by Meyer in the name of Meyer and Faulkner was not known to the appellee, and the only evidence upon which he concluded to give the credit was the statement of Faulkner, at the time he borrowed the money, that Meyer was a partner. This statement was

incompetent as against Meyer, and particularly when Faulkner, who was present when the depositions were taken, or some of them, was never called upon to give his version of the agreement between himself and Meyer.

Nor are we inclined to concur in the conclusion that for the improvement of the common estate one joint owner or partner, if he is to be termed such, is authorized to borrow money, and by reason alone of the joint undertaking his copartner made liable for the debt. An agreement to improve the mill property, each party to contribute one-half of the amount necessary to be expended, would confer on one joint owner no such an authority, and this is the substance of the agreement between the two, as appears from the proof in the record uncontradicted by any other testimony. Circumstances are made to appear showing a recognition of the fact that they were joint owners of the property, but not incumbent with the idea that no partnership existed, and these circumstances were unknown to the appellee when the credit was given, the latter acting alone upon the representation of Faulkner, who had previously made oath that no partnership ever existed. If a partnership was ever created between these parties, it was after the note had been executed, beginning from the time the mill began to run and lasting for a few weeks when Meyer sold out to Faulkner. Meyer, it seems, was perfectly solvent and Faulkner insolvent, and, while it is a little remarkable that the appellee should loan his money to an insolvent man, it is equally as singular that he should loan it for the period of eighteen months to a man he did not know, and then notify him of his obligation to pay for the first time, by a summons to answer a complaint made against him in a court of justice by reason of his failure to pay.

This judgment is *reversed* and cause remanded with directions to award a new trial and for further proceedings consistent with this opinion.

While the judgment of the court in this case must be considered as the verdict of a properly instructed jury, we think there is an absence of proof to sustain the judgment, and that neither on the law or facts was the plaintiff entitled to recover.

John Stiles, for appellant. Mix & Rogers, for appellee.

S. J. ECKLER *v.* A. P. TAYLOR, ET AL.

[Abstract Kentucky Law Reporter, Vol. 1—58.]

Sale of Personal Property.

So long as anything remains to be done by the seller, either to fit the things proposed to be sold for delivery or to put it in a different form or state in which it is to be delivered, the title will remain with the seller.

Creation of Lien.

A contract of sale does not create a lien, but if it be a valid contract its breach might be compensated in damages.

APPEAL FROM HARRISON CIRCUIT COURT.

May 27, 1880.

OPINION BY JUDGE COFER:

The contract of 1874 was ineffectual to create a valid lien on a crop raised on the land in 1877. When the contract was made the tobacco had not even a potential existence, and it could not therefore be the subject of a contract.

The contract of 1877 was a mere executory agreement to sell, and not a sale, and did not pass the title to the tobacco. The tobacco was then on the sticks in the barn and was to be stripped and delivered by Lizer. It is well settled that so long as anything remains to be done by the seller, either to fit the things proposed to be sold for delivery or to put it in a different form or state in which it is to be delivered, the title will remain with the seller.

Nor did that contract create a lien. It was intended to evidence an agreement to sell, and the parties further stipulated that certain advances made and to be made should "be paid back to said Eckler out of the proceeds" of the tobacco, but this did not create a lien. It was a valid agreement, but, like the agreement to sell, could not be specifically enforced, the only remedy for a breach being an action for damages; and consequently notice to the appellee cannot affect him, as the creditor of Lizer. The only notice that he had was that Lizer had agreed to sell the tobacco to the appellant, and that he might retain his debts against Lizer out of the price or the proceeds of the sale if Lizer should elect to have it sold for his account, instead of allowing the appellant to take it at six cents per pound.

It results, therefore, that the rights of the appellant were not

prejudiced by the rulings of the court and the judgment must be affirmed.

J. L. Ward, C. W. West, for appellant.

S. M. Martin, A. H. Ward, for appellees.

CHARLES J. HELM *v.* P. B. SPENCE, ET AL.

[Abstract Kentucky Law Reporter, Vol 1—56, as *Helen v. Spencer.*]

Distress Warrant.

Where the rent distrained for was for the use of the wife's property, such rent could not be subjected to her husband's debt.

Evidence.

When it does not appear that a married woman's title to real estate is evidenced by any writing it is not error to permit her husband to testify that the property belonged to his wife. Where the title to real estate is not in issue it is competent to prove it by parol.

APPEAL FROM CAMPBELL CIRCUIT COURT.

May 27, 1880.

OPINION BY JUDGE COFER:

Spence and wife were both parties to the distress warrant. The rent distrained for was for the use of her property, and could not be subjected to her husband's debt. Sec. 2, Art. 2, Chap. 52, Gen. Stat. It does not appear that Mrs. Spence's title is evidenced by any writing, and it was not error to allow her husband to state that the property belonged to her. The title to the property was not involved in the issue; it arose incidentally, and it was competent to prove it by parol.

Nor was there any error in refusing to allow Bodley to state what Mrs. Spence said about the rent, and if there was it does not appear what the witness was expected to answer, therefore it does not appear that the refusal to allow her to answer was prejudicial to the appellant.

The evidence as to whether there was an agreement to reduce the rent to \$20, or whether it was to remain at \$25 after the five months, was conflicting, and the court having decided that there was no agreement to reduce it to \$20 we cannot reverse on that point. That there was no evidence conducing to prove that it was fixed at \$22.50 is not material. The court found that there was no agreement to

reduce it to \$20, and that judgment was rendered for \$22.50 instead of \$25 was prejudicial to the appellee, and not to the appellant.

Judgment affirmed.

F. M. Webster, for appellant.

HENRY HOOSER v. SAMUEL R. SMITH.

C. ELLMAN, TREASURER, ET AL., v. SAME.

[Abstract Kentucky Law Reporter, Vol. 1—56, as *Huser v. Smith.*]

Conveyance of Homestead Right.

Where a homestead is not waived by a first mortgage on real estate the mortgagor may by a second mortgage waive such right, and the second mortgagee will thereby become the owner thereof.

APPEALS FROM KENTON CHANCERY COURT.

May 27, 1880.

OPINION BY JUDGE COFER:

The homestead exemption was not waived by the mortgage to Ellman, and as Britt had a homestead in the property the right to it remained in him unaffected by Ellman's mortgage.

But in the mortgage to Smith the homestead was waived and Smith's right to it was the same as if the mortgage to Ellman had not existed. As Ellman's mortgage did not waive the homestead exemption Britt was at liberty to sell or mortgage it, and the right of his vendee or mortgagee is as complete as was the right of Britt before he made the sale or mortgage, and Smith's right was in no way affected by the fact that he is not residing on the property. He is claiming a homestead in his own right. His claim is that he, as mortgagee, is entitled to the benefit of Britt's homestead.

The administrator of Britt had a right to bring the suit and have the property sold to pay first the mortgage debts, and if anything remained to apply it to the payment of other debts. The heirs of Britt were before the court in the original action, and as that sought a sale of the property to pay debts, and the mortgage debts and others were proved and allowed, the court had power to sell the property without regard to the cross-petitions.

Wherefore the judgment is *affirmed* on both appeals.

F. M. Webster, for appellants. W. H. Mackay, for appellee.

G. W. HEINGLEY, ET AL., *v.* A. W. R. HARRIS.

[Abstract Kentucky Law Reporter, Vol. 1—55.]

Office of Habendum in a Deed.

The office of the habendum in a deed is to determine the estate or interest granted, and the object in construing a deed is to ascertain the intention of the parties to it, and this is to be arrived at by considering the entire instrument.

APPEAL FROM LOUISVILLE CHANCERY COURT.

May 27, 1880.

OPINION BY JUDGE PRYOR:

The interest of each one of the grantees is clearly defined in that part of the conveyance investing the wife with the power to sell or dispose of her interest by last will and testament.

The interest is a moiety with the power on the part of the feme covert to dispose of it. That part of the conveyance technically called the "premises," in which the names of the parties are given and the reasons for the conveyance, usually precedes the thing granted, and would under the old rule have made the conveyance informal. The office of the habendum in a deed is to determine the estate or interest granted and under the old forms, or by the rigid rule of the common law, Blackstone says the office of the habendum is sometimes performed in the premises. 1 Cooley's Blackstone 298. As in this case, "This indenture made between Richardson and wife, and A. R. W. Harris and Emily T. Harris, in equal moieties with the right of the said Emily to dispose of her half by deed or will as if a feme sole, the said Emily being the wife of the said A. R. W. Harris, of the second part, etc." This part of the deed is as much the habendum as that describing the whole estate conveyed, and would be held good under a less liberal rule of construction than is now recognized by the modern authority. The object in construing a deed is to ascertain the intention of the parties, and this is to be arrived at by considering the entire instrument.

In this case the intention is manifest, and whether expressed in the premises or in that part of the conveyance usually performing the office of the habendum is immaterial. By our statute a married

woman may dispose of such an estate under an express power. Such a power was conferred on the married woman in this case.

Judgment affirmed.

L. & J. Caldwell, Winston, for appellants.

Barnett & Brown, John Roberts, for appellee.

JOHN V. GRIGSBY v. L. B. GRIGSBY.

[Abstract Kentucky Law Reporter, Vol. 1—62.

Reported in full, 8 Ky. L. 131.]

Creation of a Trust.

Where a purchaser buys his brother's interest in property sold in bankruptcy such a purchase, in the absence of any agreement between the brothers, will not create a trust in favor of the bankrupt; nor will a letter written some years thereafter by the purchaser to his brother, stating that "I wrote you long ago that I bought your interest in everything in Kentucky and Louisiana at the sale in bankruptcy for \$100, and, if there was anything made out of it you should have the benefit of it" impress such property with a trust at the time of the purchase or when the conveyance was made.

Gratuitous Promise not a Trust.

A mere declaration of an intention to give will not create an enforceable trust, even though the declaration be made by a brother.

APPEAL FROM CLARK COURT OF COMMON PLEAS.

May 27, 1880.

OPINION BY JUDGE PRYOR:

In the opinion of the chancellor the judgment for the appellee is made to rest alone on the idea that a trust had been created or declared in favor of the appellant by the letter written many years prior to the filing of the appellee's answer and cross-petition. That the appellant, John V. Grigsby, had purchased the interests of the appellee in his father's estate as well as his interests in other property at the sale by the assignee in bankruptcy is conceded, and in no pleading filed by the appellee is it alleged, directly or inferentially, that the purchase was made for the appellee or that any agreement existed between the two that the purchase should be made for the appellee's benefit. It is, however, alleged that subsequent to appellant's purchase the latter for a valuable or legal consideration agreed to give, or rather did give, to the appellee all the interests he had

purchased at the bankrupt sale; and that this agreement was based on the consideration that the appellee would remain in Kentucky and return to Winchester, his former home. An amended answer was also filed in which it is alleged in plain terms that the appellant agreed to surrender his interest purchased at the sale of the assignee in bankruptcy on the condition that the appellee would remove from New York to Kentucky and resume the practice of the law in Winchester. A performance of the contract on the part of the appellee is alleged and a noncompliance on the part of appellant. The chancellor finds that the contract as set forth is not established by the proof, and in this view of the case we concur.

The two brothers make conflicting statements in regard to these promises on the part of the appellant, and leave the case as if no proof had been taken on the issues made. The appellee, during the progress of the case, introduced in evidence a letter written to him by the appellant in April, 1872, in which he, appellant, says: "I wrote you long ago that I bought your interest in everything in Kentucky and Louisiana at the sale in bankruptcy for \$100, and if there was anything made out of it you should have the benefit of it." It is not contended that the property was impressed with a trust at the time it was purchased or when the conveyance was made, but that the appellant has created a trust by announcing his intention to permit his brother to have the benefit of his purchase. This letter might be persuasive evidence of an agreement to purchase for the appellee; but, when this fact is not alleged, and the whole case made to rest on a promise to give upon certain considerations stated to have existed, it is difficult to see how a trust is to be established when no such claim is asserted by the appellee.

Regardless, however, of this view of the question, we cannot assent to the proposition that a declaration of an intention to give creates such a trust as will be enforced, or such a contract as will enable the chancellor to say that the promise should be enforced. The promise to give in this case is purely voluntary, and with a view of aiding a brother in pecuniary trouble. The gift never was perfected, and the proof shows that when a demand was made of the appellant to the effect that he should convey the property, he made a partial conveyance, or rather a conveyance of a part of the property purchased by reason of his gratuitous promise, and declined to convey the interest in his father's estate for the reason, as is alleged and to some extent established, that he had made advance-

ments in money to the appellee equal in value to the interest claimed. This court, in the case of *Buford's Heirs v. McKee*, 1 Dana 107, in discussing the doctrine applicable to the question involved here, says: "The whole foundation of the principle which turns mere gratuitous engagements, and voluntary promises of bounty and munificence, into contracts of obligatory efficacy, is of such doubtful equity, that we feel no disposition to carry it farther than it has already gone."

In this case the equity asserted by the appellee does not strike the mind of the chancellor so as to control his action in the case, when he considers the liberal advancements made him by his brother during the existence of his pecuniary troubles. The doctrine announced by this court in cases involving the principle on which this judgment was rendered is adverse to maintaining or enforcing mere voluntary agreements between collateral kindred, and in no case in this court has this doctrine been recognized.

To determine a trust in this case would be to enforce a voluntary agreement, a mere gratuitous promise by one brother that he would aid the other by giving him property to which the donor at the time had a complete and perfect title.

In the case of *Buford's Heirs v. McKee* the covenant was to give land to his nephew. Where there is a mere intention, says Perry, and the donor contemplated some further act to be done by him to give it effect, the trust is not completed, and if voluntary cannot be enforced (Perry, 96-97-99). But, as before stated, it is nowhere alleged that a trust was created or declared, and the right of recovery is made to depend alone upon the contract as alleged.

The inconsiderable sum paid for the property, together with the declaration of an intention that the brother should have the benefit of the purchase, would go far toward showing that the purchase was made in the first place by appellant as his brother's agent and for his benefit; but the argument made by counsel on this ground cannot be maintained, as no such claim is presented by the pleadings. As we understand, the issue here is as to the interest of appellee in his father's estate only, and with a proper pleading seeking a recovery on the idea of a trust the appellant might have interposed a defense other than the mere denial of the existence of the contracts alleged to have been made between the parties.

The judgment below is *reversed* and cause remanded for further proceedings not inconsistent with this opinion.

Chas. Eginton, B. J. Peters, W. P. D. Bush, for appellant.

William Lindsay, for appellee.

N. S. HUME *v.* A. J. McNEES.

[Abstract Kentucky Law Reporter, Vol. 1—56.]

Estoppel.

Where one representing himself as the owner of the land to induce another to erect a mill on it leased his land for such purpose, gave his written consent to the erection of a dam across the river, gave the stone for the foundation of the mill, and although he saw the mill and a dwelling being erected, made no objection to either until long after both were completed and the lessee had sold his interest in the mill, he will be held to have consented not only to the erection of the mill, but to the erection of the dwelling also, and will be estopped to repudiate such consent.

APPEAL FROM HARRISON CIRCUIT COURT.

May 29, 1880.

OPINION BY JUDGE COFER:

There can be no doubt but that the inducement to make the lease was the desire of the appellant to have a mill at Berry's Station, where he owned a farm and was engaged in selling goods. When the steam mill was destroyed by fire the lessee was unable to rebuild it, and the practicability of erecting a water mill began to be discussed. The appellant approved that project and gave his written consent to the erection of a dam across the river for the proposed water mill. In that writing he represented that he was the owner of land where one of the abutments would be located, and no doubt then supposed that the land covered by the lease extended to the river, and intended to consent that the abutment and the mill should be erected on the leasehold. He gave the stone for the foundation of the mill, and although he saw the mill and the dwelling being erected made no objection to either until long after both were completed and Johnson had sold his interest in the mill to the appellee. This conduct on his part is sufficient to prove that he in fact consented not only to the erection of the water mill, but to the erection of the dwelling also, and it would be a reproach to a court of equity

to permit him, after he stood by in silence and saw a house worth several hundred dollars erected on the premises, and after the title had passed to an innocent purchaser to repudiate his previous consent by acquiescence and to deprive the appellee of property bought and paid for under such circumstances. It is true the appellee was bound to know the terms of the lease, but it is also true that he knew the circumstances under which the dwelling was erected, and had a right to presume that the appellant had consented to its erection.

Judgment affirmed.

T. T. Foreman, for appellant. J. L. Ward, for appellee.

LOUISVILLE & N. R. CO. *v.* THOMAS J. HUDSON, ET AL.

[Abstract Kentucky Law Reporter, Vol. 1.—66.]

Negligence by Railroad Company in Failing to Give Warning of Approach of Train.

Where a railroad runs near to and parallel with a public road it may be negligence to fail to give warning of the approach of a train, even when on time; but whether it is negligence in either case depends upon the question whether, in view of the location of the roads, such a precaution would be regarded as reasonably necessary to prevent injury to persons traveling on the nearby road.

Degree of Care Required of Railroad Company to Prevent Injury to Others.

The care required by a railroad company to prevent injury to persons must be proportionate to the danger, and it must follow that greater care is demanded when a train is off than when it is on time.

Evidence of Surgeon's Fees.

In a suit for personal injuries against a railroad company it is error to admit proof of the payment of surgeon's fees by the injured party where no claim is made in the petition for such fees.

APPEAL FROM BOYLE CIRCUIT COURT.

May 29, 1880.

OPINION BY JUDGE COFER:

We did not decide as matter of law, when the case was here before, *Hudson &c. v. Louisville &c. R. Co.*, 14 Bush 303, that it was negligence to fail to give warning of the approach of a train that was behind time. What we decided was that the court erred in de-

ciding as matter of law that it was not negligence. We said: "And while we do not mean to decide or to intimate that there was negligence in failing to give warning of the approach of the train, we do mean to hold that the court below erred in deciding that there was no negligence for which the company is liable."

The fact that a train is behind its usual time is an element to be taken into consideration by the jury in deciding whether there was negligence. When as in this case a railroad runs for a considerable distance near to and parallel with a public road, it may be negligence to fail to give warning of the approach of a train even when on time. But whether it is negligence in either case will depend upon the question whether in view of the location of the roads toward each other such precaution would be regarded as reasonable and necessary to prevent injury to persons traveling on the neighboring road.

That there is more danger of injuring persons traveling on such road when the train is behind time than when on time does not seem to admit of discussion. As the law is that care must be apportioned to the danger it would seem to follow that greater care is demanded when a train is off than when it is on time.

No claim was made in the petition for surgeon's fees, and it was therefore error to admit proof of the payment of such fees or to instruct the jury that they might take such payment into account in assessing the damages. Whenever the damages sustained do not necessarily accrue from the act complained of, and consequently are not implied by law, then, in order to prevent surprise on the defendant which might otherwise ensue on the trial, the plaintiff must in general state the particular damages he has sustained, or he will not be permitted to give evidence of it. Chitty on Pleadings, (16th Am. ed.) 348; Sedgwick on Damages, § 1261.

We perceive no objection to any other instruction or ruling of the court.

For the errors indicated the judgment is *reversed*, and the cause remanded for a new trial.

Durham & Jacobs, Littleton Cooke, for appellant.

Thompson & Thompson, for appellees.

JOHN W. FOWLER v. HENRY FOWLER, ET AL.

[Abstract Kentucky Law Reporter, Vol. 1—63.]

Decedent's Estates.

Where a decedent left surviving him eight children, but one of them died thereafter before the settlement of the estate, it is error to apportion and settle the child's estate in the proceeding to settle the estate of the father. The one is entirely separate from the other.

APPEAL FROM HARDIN CIRCUIT COURT.

May 29, 1880.

OPINION BY JUDGE PRYOR:

This judgment must be reversed. The distribution made of the estate as if there were eight heirs living was proper, and the fact that Warren M. Fowler died after his father does not make his interest become a part of his father's estate. If the appellees are entitled to recover, it is as heirs of Warren Fowler and not as heirs of their father, and the demurrer to the petition ought to have been sustained to that extent; in other words,—this claim has nothing to do with the case. If the agreement to divide Warren's interest was based upon the consideration that these parties would become the sureties of Warren, the agreement must be declared on and the consideration alleged. The appellees, or one of them, F. K. Fowler, only claims about \$55 for the lunatic in his pleadings, and the commissioner should not have gone beyond this in the absence of an amended pleading. It is unnecessary, however, to notice the exceptions taken, as the interest of Warren Fowler is made the basis of the settlement; and as it can form no part of the deviser's estate the judgment is *reversed* and the cause remanded with directions to settle the estate of Felix Fowler as if no report had been made by the commissioner or judgment rendered.

This record does not show that the assignment of errors was amended, and if it did we cannot well see how any error assigned affecting the judgment could fail to embrace the idea that the judgment had been rendered for more than the parties were entitled to recover.

W. H. Chelf, A. Duvall, for appellant.

James Montgomery, Hays & Bush, for appellees.

MATILDA WALKER v. J. L. SPALDING, ET AL.

[Abstract Kentucky Law Reporter, Vol. 1—64.]

Husband and Wife.

The wife has a right to give property to her husband, to permit him to use her property or to pledge it as security for his debt.

Liability of Executor and His Sureties.

Where the executor has advanced money to a husband or because personally liable for a debt of the husband, and as executor of the estate of the wife's father has money belonging to the wife, which she agrees may be given to him on account of the husband's debt, neither the executor or his sureties are liable to account to her for the money thus received.

APPEAL FROM NELSON CIRCUIT COURT.

May 29, 1880.

OPINION BY JUDGE PRYOR:

Neither the surety in the bond of the executors nor the executors are liable for the \$1,610, claimed by the appellant. The money appellant inherited from her two brothers she had the right to dispose of as she pleased. She consented that her husband should pledge it or leave it in the hands of Spalding to indemnify him as the surety of the husband for the \$1,500 the latter had received as the trustee of his wife, the appellant. If Spalding had accounted to the appellant for the \$1,500 he could have held the \$1,600 left in his hands to indemnify him. It was an appropriation by the husband by the consent of the wife for that purpose. Spalding has accounted for the \$1,600 in the judgment rendered against him as trustee. He was appointed as trustee in room of the husband of appellant, and if in his settlement as trustee or executor he has accounted for the \$1,500 by surrendering the \$1,600, or had the settlement on that basis, it is conclusive against appellant.

That this is the case the record of the action against him plainly shows. The settlement made shows a balance due the appellant of \$2,300, and to this is added \$1,610. This constituted the trust fund for which Spalding was liable, and for this the appellant obtained a judgment. The fact that she was a feme covert did not prevent the appellant from consenting to the appropriation of the money by her husband. She had the right to give it to him or permit him to use it, and not only so, but he had the right to collect it from the

executors, and his receipt would have prevented any assertion of claim by the wife.

We see no reason for disturbing the judgment and the same is *affirmed*.

Muir & Wickliffe, for appellant.

William Johnson, for appellees.

A. J. BALLARD, TRUSTEE, ET AL., v. M. GLEASON.

[Abstract Kentucky Law Reporter, Vol. 1—60.]

Dedication of Highway.

If a street is laid off and lots sold bordering upon it the purchaser takes the lot with the right to the use of the street, and this will amount to a dedication of the street to the use of the public; but an alley, known as a blind alley, which does not run from street to street, but is a passageway only for the use of the property bordering upon it, and not for the use of the entire public, when laid out is not dedicated to the public, but may be closed by its owners at their pleasure; and such an alley may not be improved by the city and the adjoining property assessed for such improvement.

APPEAL FROM LOUISVILLE CHANCERY COURT.

May 29, 1880.

OPINION BY JUDGE PRYOR:

After a careful examination of this record we have been unable to find any evidence of a dedication, by the original or present owners of the property taxed, of the improved alley to the city of Louisville. The fact that the boundary of each lot called for the alley is no evidence of a dedication; nor is the fact that the holding under Nicholas' claim to the alley sufficient to invest the public or the city with the right of way over the improvement. The alley is not a street, but must be regarded as a private passway held in common by the original owners or their vendees for the common use and convenience of the lots bounding upon it. The alley is what is termed a blind alley. It does not run from street to street, but is a passway recognized and established for the use of the property bordering upon and formerly owned by Nicholas and Thurston. If a street is laid off and lots are sold bordering upon it, the purchaser takes the lot with the right to the use of the street, and this location of the street with the sale of the lots bordering upon it is a ded-

ication of the street to the use of the public as well as to those whose lots border directly upon it.

There is no analogy between the opening of a recognized street in a city, and that of an alley that is merely intended to enable the owners of common property to pass to and from it. The alley was laid off by the commissioners, and at the instance, no doubt, of the owners for the use of the property divided, but not for the use of the entire public, not a dedication that would take from the owners the right to use it as they pleased, or even close it, if they deemed it necessary. Both the commissioner and the chancellor in the original division recognized the alley as the common property of those interested in the partition, and therefore it is expressly stated that it is for the use of the property divided. It is public to that extent and no further. The original owners and their vendees with their lots bordering on this alley are alone interested in keeping it open, or in improving it. The city has no power over it, except such as is necessary for the exercise of its police regulation, and judgment is *reversed* with directions to dismiss the petition as against these appellants.

Barr, Goodloe & Humphrey, for appellants.

S. B. Richardson, for appellee.

E. W. LAMPTON, ET AL., v. NANCY LEWIS, ET AL.

[Abstract Kentucky Law Reporter, Vol. 1—66.]

Return on Executions.

Where an execution is issued on a judgment and is returned "No property found" the chancellor has jurisdiction in the proceeding supplemental to execution.

APPEAL FROM HARDIN CIRCUIT COURT.

May 29, 1880.

OPINION BY JUDGE PRYOR:

The right of the feme to sue we think is unquestioned, and that the petition presents a cause of action is equally certain. Various judgments are set up upon which executions issued, and upon which it is distinctly averred there was a return of no property found. The one exhibit filed shows a return of "not found" only, but it stands admitted on the record that the other executions were returned "no

property found". These allegations are not denied, and the admission is sufficient to give the chancellor jurisdiction and to let in other executions, although no such return has been made on them. The case, being made out by the appellee, Mrs. Lewis, authorizes a judgment in favor of Jagers, also; and the fact that the land is ordered to be sold subject to Aldibrook's mortgage does not prejudice the appellants.

The petition of Williams to be made a party is not sworn to, nor does it appear that the assignment was made by Lampton to him. It may have been made after the institution of the action. Neither is Lampton entitled to a homestead as against these creditors, nor does his answer present any defense to the action. The judgment directing the manner of sale is not so defective as to authorize a reversal on that ground.

Judgment *affirmed*.

Montgomery & Marriott, for appellants.

Wilson & Hobson, for appellees.

H. C. TIMBERLAKE v. CITY OF NEWPORT.

[Abstract Kentucky Law Reporter, Vol. 1—65.]

Res Adjudicata.

A demurrer sustained to a petition because it presents no cause of action does not bar another action, but when the defendant pleads and puts in issue the right of recovery, and the cause is submitted on the petition and answer and a judgment is rendered dismissing the petition, such a judgment will bar any further action on the same cause, whether proof is introduced or not.

APPEAL FROM CAMPBELL CHANCERY COURT.

May 29, 1880.

OPINION BY JUDGE PRYOR:

On the former hearing of this case involving the right of the city to recover for the identical claim for which the present judgment was rendered, the case was tried on its merits and a judgment rendered dismissing the appellee's petition. In discussing the question raised in this court, involving the sufficiency of the pleading on the part of the city, it was held that the petition was defective by reason of the failure to make certain averments; still, with the answer

filed, the case might have been disposed of on the merits, and was doubtless so adjudged by the court below. The allegations of the petition were traversed by the answer, and the liability of the appellant to the city placed directly in issue.

A demurrer was interposed to the answer and overruled, and the appellee, the city, regarding the answer as presenting no defense, submitted the case on the petition and answer and a judgment was rendered for the defendant, and of course involved the right of recovery. A demurrer sustained to a petition because it presents no cause of action constitutes no bar to another action; but where the defendant pleads and places in issue the right of recovery the case is then ready for proof, and a submission on the petition and answer and a judgment thereon dismissing the petition is as much a bar as if proof had been introduced on each side of the case. The whole merits of the cause could have been tried on the issue made, and were in fact tried when the statements of the answer were admitted as true.

An issue of fact was certainly made by the answer of the defendant; and the city, relying on the pleadings as conclusive of the right to recover, submitted the case. This was a trial on the merits, and the plea in bar should have been sustained. This court on affirming the judgment may have and did determine that the petition was insufficient; but still the defendant was entitled to demand a trial on the facts. When conceding the statements of the answer to be true for the purposes of a hearing it is now too late for the plaintiff to question the sufficiency of its own complaint.

Judgment *reversed* and cause remanded with directions to dismiss the petition and give to the appellant his judgment for costs.

F. M. Webster, for appellants. A. T. Root, for appellee.

[Cited, *Covington v. Taffee*, 24 Ky. L. 373, 68 S. W. 629.]

OLD STATE ROAD & RIPPLE CREEK TPK. CO. v. BENJAMIN SMITH,
TRUSTEE, ET AL.

[Abstract Kentucky Law Reporter, Vol. 1—125.]

Sale of Franchises.

A franchise to build and operate a turnpike road cannot be made the subject of sale in the absence of some special legislation authorizing it.

Bonds of Turnpike Company.

Where, pursuant to the provisions of the act of February, 1872, empowering a turnpike company to issue its bonds, a company issues its bonds and executes a mortgage to secure the bondholders, and the officers and directors are the creditors, and the transaction is in good faith, such bonds will be held valid even though issued by such directors to themselves, when they have advanced the money to build the road.

APPEAL FROM CAMPBELL CHANCERY COURT.

June 1, 1880.

OPINION BY JUDGE PRYOR:

It is now the settled law of the state that such a franchise, the right to which is involved as in this case, cannot be made the subject of sale, in the absence of some special legislation authorizing it. Since the case of the *Winchester & Lexington Tpk. Road Co. v. Vimont*, 5 B. Mon. 1, various manuscript opinions have been delivered following the principles there announced. Also, the cases of *Applegate v. Ernst*, 3 Bush 648; *Elizabethtown & Paducah R. Co. v. Trustees*, 12 Bush 233; *Phillips v. Winslow*, 18 B. Mon. 431, and other cases, determine in effect that such sales cannot be made. This rule of law has been so often recognized and so well understood that it ought not to be disturbed; nor is it necessary, in view of this fact, to discuss the policy or the wisdom of this rule.

It was therefore error to sell the road for payment of its debts, although an insolvent debtor, and to make it subject to the payment of all its indebtedness without regard to the legislative enactment on the subject. The Act of February, 1872, empowered the turnpike company to issue its bonds for a limited amount and to sell the same in satisfaction of its debts. A mortgage was also executed for the purpose of securing the holders of these bonds to one Benjamin Smith, all being done in accordance with the act of the legislature already referred to. It seems that the president and directors of the company were its principal creditors, and had in fact expended their own means as contractors in completing the road. It is manifest from the entire record that the cause of this expenditure by the directors had its origin from the fact that no one else was willing to assume the responsibility and look alone to the road for its payment, and the officers of the road, expecting to be protected by future legislation on the subject, constructed the road, or a part of it, out of their own resources. It was an improvement that benefited the

county and locality through which it was made, and without completion must have resulted in great loss to the stockholders.

It was the improvement they desired that induced its construction, and not the anticipation that an annual income would be paid on the investment made. Such improvements ordinarily yield a sum about sufficient to keep them in repair, and such appears to have been the experience of this enterprise, for while the road has been in the hands of a receiver for the purpose of paying its debts, it yields a sum scarcely more than sufficient to keep it in repair. If officers of this company have expended their money in good faith, we see no reason to disregard the action of the legislature, or any cause for adjudging the bonds issued to be void. Their taking the bonds without exposing them to public auction may not invest the officers of the road with title, or enable them to enforce payment; still, by the action of the board the bonds were issued and a mortgage executed to secure their payment. The mortgage and bonds were issued, or rather executed, before the appellee's term of office expired, and the bonds should be held valid for the purpose of paying the indebtedness to those who have expended their money, whether officers or not, in constructing the road or such expenditures as were necessary for that purpose. The deed of trust or mortgage to Smith was in fact executed on the 1st of May, although not acknowledged until a subsequent period. It would certainly look unjust to these claimants, if they have expended their money in good faith, to require them to lose it, or decline to make the product of their labor responsible for its payment. Since the legislature authorized the execution of these bonds and the company has in good faith proceeded to act under it, the chancellor will carry into execution the acts of the former board, although they may and do have a personal interest in the results.

Although the accounts of the company seem to have been loosely kept, and there is much trouble in arriving at a conclusion as to the amount due each of the parties, still, the commissioner has not only bestowed much labor in its investigation, but from the proof before him has adjusted the accounts, and upon the return of this cause the report should be adopted unless the appellant desires to take proof. The appellant may examine the parties and take other proof on the question if desired, and this can be done by a reference back to the commissioner if the appellant desires it. The appellees should be required to surrender the bonds, and for the indebtedness, the bonds,

after proper advertisement made, should be sold to discharge it, unless otherwise paid. In this view of the case it may be proper to file an amended petition.

Judgment reversed and cause remanded for further proceedings not inconsistent with this opinion.

E. W. Hawkins, for appellant. Stevenson & O'Hara, for appellees.

HARRIS & MARTIN v. R. W. NEELEY.

[Abstract Kentucky Law Reporter, Vol. 1—55.]

Exceptions to Evidence Offered.

Neither the admissibility of evidence nor the competency of evidence offered by depositions can be considered by the Court of Appeals where it is not shown that the trial court ruled upon the exceptions tendered by appellants. Such exceptions will be treated as waived by appellants.

Rescission for Want of Title.

After a plaintiff in an action for a rescission for want of title has mortgaged the land for near its value, and when they do not tender a release upon instituting the action, they are not entitled to the relief asked for.

APPEAL FROM SIMPSON CIRCUIT COURT.

June 1, 1880.

OPINION BY JUDGE HINES:

Neither the question of the admissibility in evidence of the exhibits relied upon in the court below nor the competency of the evidence offered by depositions can be considered by this court. The court does not appear to have ruled upon any exception tendered by appellants, and the exceptions must therefore be treated as waived by appellants. This rule is too well established to permit us to inquire into its correctness. *Corn v. Sims*, 3 Met. 391; *Lewis v. Wright*, 3 Bush 311; *Russell's Heirs v. Marks*, 3 Met. 37. We must treat the exhibits and the other evidence in the case as if heard without objection on the part of appellants. So treating it we find that the paper denominated a grant from the Mexican government to Henry Jones substantially purports to vest in Jones the title to the land in controversy. It is agreed to be a genuine document, and comes certified as a public record from the archives of the state of Texas, and

must be considered as evidence that the state of Texas asserts no claim to the land and recognized the validity of the grant from the Mexican government.

As we have already intimated, the question of the incompetency of this paper as evidence, by reason of the absence of a seal or for any other reason, cannot be considered, because it was admitted in evidence without objection. When this is supplemented with the fact that since the date of the grant, in 1824, the land has been in the undisputed possession of those claiming under the grant, and with the further fact that P. E. Pearson, skilled in the law, testifies that the title claimed under the grant is good, the conclusion is inevitable that the heirs of Henry Jones took an unblemished fee-simple title.

The next link in the chain of title is the division between the heirs of Henry Jones and the acquisition of title by the appellee from them. As to the division between the heirs the record shows that it was made by judicial proceedings, though informal, and that the several portions allotted were taken possession of by the respective heirs and have been acquiesced in ever since. This division, as shown by the deposition of Pearson, has been held as binding by the courts of Texas, and, waiving the question of title in appellee by previous division between and acquiescence by the heirs, it appears to us that the deed of agreement exhibited in evidence is sufficient to vest in appellee title, if not otherwise, by way of estoppel. The evidence, which is unquestioned, shows either signature in person by these heirs or by those having authority to sign for them, and confirmation of the instrument after signature. Power of attorney in writing and of record to sign for the heirs was not required when oral evidence of the fact had been heard without objection, which can be made available here. On the face of this record appellants are assured with title which would be sufficient for their protection against any adverse claimant, whether it be the state of Texas or the heirs of Henry Jones. The failure to have the court below rule upon exceptions to the evidence offered renders it unnecessary to answer in detail much of the able argument of counsel as to the competency of the evidence; beside, in general, whatever is unnecessary in an opinion is improper.

As to Ferris and Willie Barrett, heirs of Henry Jones, who died in infancy, it is doubtful whether, if they left any children, they would be entitled to any interest in the land; but if they left children and they were entitled to any interest it would only be one-

tenth of the land agreed to be conveyed; and as the amount shown by the survey is about 100 acres in excess of what was stipulated for in the title bond, and as such heirs, in any event, would not be entitled to more than fifty acres, the judgment will not be disturbed for such an uncertain claim and for such an insignificant amount.

We do not think that, under the circumstances of this case, time should be considered of the essence of the contract. When the first deed was made the objection was that the wife of appellee did not join in the deed, and that the courses and distances were not given with sufficient certainty. The objection that appellee had no title does not appear to have been insisted upon until the institution of this action. The action is for a rescission for want of title. In the meantime appellants had mortgaged the land for near its value, and they do not tender a release when the action is instituted for a rescission, so they were not then in an attitude to have the relief asked for. Appellants do not show damage by reason of failure to convey, and if they did we think the delay in applying for title, such as is now demanded, is as much their fault as the fault of appellee. They should not be permitted to speculate upon the chances of a rise or fall in the value of the property. *Henry v. Graddy*, 5 B. Mon. 540; 2 Chitty on Contracts 433.

There appears to be nothing to support the charge of fraud. Appellee appears to have acted in good faith, and it appears that appellants were not necessarily misled to their prejudice by any representation made by appellee.

There is nothing in the judgment for costs of which appellants have a right to complain. Under Chap. 26, Gen. Stat., appellee was properly entitled to recover the whole of his cost against appellants, appellee having succeeded on the merits of the controversy.

Judgment affirmed.

R. Rodes, G. W. Whitesides, Wm. M. Gorin, for appellants.

Bush & Porter, A. Duvall, for appellee.

JOHN WALKER v. WILLIAM HENRY.

[Abstract Kentucky Law Reporter, Vol. 1—63.]

Evidence of Value of Money.

When the issue was the value of confederate money at the time and place when a loan was made evidence is incompetent seeking to prove such value at other times or places.

Costs.

Where, in an action a notice of willingness to allow judgment conforms to the statute, such a defendant is entitled to a judgment for his costs thereafter expended.

APPEAL FROM WOODFORD COURT OF COMMON PLEAS.

June 1, 1880.

OPINION BY JUDGE COFER:

The rejected evidence was clearly incompetent. The question at issue was the value of Confederate money at the time and place when and where the loan was made, and the value of such currency at other times or places did not tend to elucidate that issue.

Parol evidence that the appellee promised to pay the money in Kentucky was not competent, and consequently the instruction to the effect that an agreement to pay in United States currency was usurious was not prejudicial to the appellant. The instruction to find for the plaintiff the value of the money loaned in the United States treasury notes was correct.

In *Rivers v. Moss*, 6 Bush 600, this court held that the value in gold was the criterion, but since that time the Supreme Court has held greenbacks to be a legal tender, and as that constitutes the principal currency, and at the time of the contract was made was the only currency in circulation here, it is now proper to adopt that basis.

The evidence as to the value of Confederate money was conflicting, and as there was some evidence to support the finding of the jury this court cannot interfere to grant a new trial on that ground, although the verdict seems to be against the weight of the evidence.

Of course, if, as we have already intimated, the appellant was only entitled to recover the value of the Confederate notes loaned, the answer setting up the fact that such notes were the only consideration for the note sued on was good, and the motion for judgment non obstante veredicto was properly overruled.

The notice of a willingness to allow judgment to go was in conformity to the statute, and the judgment in favor of the defendant for his costs thereafter expended was proper.

Perceiving no error in the judgment the same is *affirmed*.

Porter & Wallace, J. W. Lewis, for appellant.

D. L. Thornton, for appellee.

JAMES D. COLE v. BENJAMIN RHOR.

[Abstract Kentucky Law Reporter, Vol. 1—62.]

Homestead Exemption.

There is no remainder in a homestead that can be sold while the debtor is living.

Sale of Homestead.

Where a defendant is entitled to a homestead the officer holding an execution has no right to sell the property without setting apart the defendant's homestead. The purchaser at such a sale takes the property subject to the homestead, and as to the extent of its value he acquires no title.

APPEAL FROM HARDIN CIRCUIT COURT.

June 1, 1880.

OPINION BY JUDGE PRYOR:

In this case, while the proof may not be altogether satisfactory as to the intention of the appellant when leaving his residence, still, as the evidence is conflicting as to his purpose to abandon it, the chancellor acted properly in adjudging that he was entitled to a homestead. The officer had no right to sell under the execution without setting apart his homestead, and the sale passed no interest in remainder to the purchaser. He certainly takes the property subject to the homestead, and as to that or to the extent of its value he acquired no title whatever. The proof showing that the property was worth less than \$1,000, no right was acquired by the appellee. There is no remainder in a homestead that can be sold while the debtor is living.

The judgment, therefore, determining that the purchaser held the property in remainder, is reversed and cause remanded with directions to set aside the sale. If the property can be divided the sheriff or commissioner should allot to the appellant his homestead and sell the balance, or, if indivisible, sell the whole lot and pay to the appellant \$1,000.

Judgment *reversed* and cause remanded for further proceedings consistent with this opinion.

Wilson & Hobson, Hays & Bush, for appellant.

James Montgomery, for appellee.

[Cited, *Louisville Fertilizer Co. v. Lorton*, 33 Ky. L. 676, 110 S. W. 870.]

CHARLES M. TALBOTT *v.* C. P. TALBOTT.

[Abstract Kentucky Law Reporter, Vol. 1—64.]

Construction of Will—Residuary Clauses.

When in a will after naming specific legacies it is provided that "Whatever is left of my estate after deducting the \$6,000, given for the use of William and the devise to sue Talbott, C. P. Talbott and Fanny Lymington, and the payment of my debts, shall go to my son, Chas. H. Talbott," it is held to mean that it was intended to embrace in such residuary clause such estate as had not already been mentioned in the will, and that where one of said legatees dies before the testator, as to the property set apart for him in the will the testator died intestate.

APPEAL FROM BOYLE CIRCUIT COURT.

June 1, 1880.

OPINION BY JUDGE COFER:

After setting apart the fund intended for the use of his son, William B., and making a devise to his granddaughter-in-law, his grandson and his wife's granddaughter, the testator declares that whatever is left of his estate after these legacies are satisfied shall go to the appellant.

From a careful reading and study of the whole will it seems to us that the testator had in his mind, when he wrote the residuary clause, only that part of his estate included in the special legacies, and that he used the word "satisfied" to convey the same meaning that would have been conveyed if he had said "Whatever is left of my estate after deducting the \$6,000 given for the use of William and the devise to Sue Talbott, C. P. Talbott and Fanny Lymington, and the payment of my debts, shall go to my son, Chas. H. Talbott."

These legacies had been carved out of the estate before he came to write the residuary clause, and he no longer regarded them as a part of his estate. In one sense the legacy for the support of William was satisfied when he died without heirs of his body, but in another sense it was satisfied when the amount was set apart or deducted from the residue of the estate, and we are satisfied that the testator meant the same thing as if he had said that all his estate except the amount of these legacies should go to Charles.

If it had been his purpose to give to Charles the sum bequeathed for the use of William that purpose could and most likely would have been clearly expressed. He most likely would have said, "If

said son William shall die without heirs of his own body, then this provision shall go to my son Charles," instead of saying, it shall "fall back to my estate." It was certainly not only an unnecessary but an awkward circumlocution to direct the legacy to fall back to his estate if it was his intention to give it to Charles. The fund was placed in the hands of Charles to be held by him as trustee for William until the latter's death.

If William left heirs of his body the fund was to be paid to them, and if the intention of the testator was that in the event William left no such heirs Charles was to take it, it would at once have occurred to the testator to say so, instead of first remanding it to his estate and then giving it to Charles by a separate clause.

The most natural and consistent interpretation of the residuary clause is that it was intended to embrace only such estate as had not already been mentioned in the will; and to construe it to embrace alike the legacy for the use of William and the land devised to Mrs. Sue Talbott, in case of her death without children, would, we think, be to strain the language beyond its natural import, which will not be done even for the purpose of preventing partial intestacy.

The law gives the surplus estate of deceased persons to those who are heirs or distributees, and while it does not favor a construction which leaves a part of the testator's estate undisposed of this can only be avoided when the court can find in the will language which in view of the whole will is sufficient to dispose of the whole estate.

This we do not find in this will, and the judgment must be affirmed.

John Cowan, Van Winkle & Rodes, for appellant.

R. P. Jacobs, for appellee.

A. H. THOMAS, ET AL., v. JAMES MCGUIRE.

[Abstract Kentucky Law Reporter, Vol. 1—65.]

Rights of a Licensee.

A contract not in the nature of a lease, but in the nature of a license, imports trust and confidence in the exercise of rights by the licensee, and such rights cannot be delegated or assigned as in case of an ordinary lease.

Admissibility of Evidence.

Where a contract is not a lease, but amounts to a license, and is therefore not assignable, there is no error in the court's refusal to allow proof of the assignments of such contract.

APPEAL FROM LEE CIRCUIT COURT.

June 1, 1880.

OPINION BY JUDGE HINES:

The contract between appellee and G. W. Webb is not in the nature of a lease which would authorize the lessee to sublet, but a contract in the nature of a license to Webb to enter upon the land and, in conjunction with appellee in the character of a partner, to do certain things. It imports trust and confidence in the exercise of rights by Webb that cannot be delegated, as in the case of an ordinary lease for years when the owner of the realty parts with the whole interest for a time certain. There was, therefore, no error in refusing to allow appellants to prove the assignments to the several defendants of the contract made by appellee with Webb; nor was there any error in refusing the evidence of Pryse because it would in effect contradict the written terms of the contract between appellee and Webb without any allegation of fraud or mistake.

There is error, however, in the instructions given by the court below. The effect of these instructions is to make each and all of the defendants responsible for the trespass of the others with which they had no connection. The evidence in this case shows that in the trespasses committed by some of these appellants there was no participation by others, no conspiracy, no advising or encouraging, and no ratification. Without some of these elements there can be no joint liability. A joint liability necessarily imports a joint wrong. This is ignored by the instructions given, and this fact necessarily rendered the instructions detrimental to all by misleading the jury.

Wherefore the judgment is *reversed* and cause remanded with directions for further proceedings.

H. C. Lilly, for appellants. William Lindsay, for appellee.

M. E. SPRAY *v.* JOHN WRIGHT.

[Abstract Kentucky Law Reporter, Vol. 1—67.]

Homestead Exemption.

A petition of a married woman, not showing that she and her husband were occupants and owners of the house and lot and housekeepers with a family prior to the creation of the debt for which the property was subjected, fails to state a cause of action on a claim of a homestead exemption.

APPEAL FROM DAVIESS CIRCUIT COURT.

June 1, 1880.

OPINION BY JUDGE HINES:

The petition sets up no claim of title in appellant to the property in controversy, except the claim of homestead as the wife of A. Spray. She alleges that "her husband, A. Spray, is now and was at and before said suit was brought, and ever since has been, a bona fide housekeeper with a family, and this plaintiff has occupied said premises as a place of residence with her said husband." To this there is a denial that appellant was a housekeeper, but no specific denial that A. Spray was a housekeeper. Without proof and on the face of the pleadings the court dissolved the injunction previously granted and dismissed the petition.

Without regard to the answer the judgment of the court was correct. The petition does not show that appellant and her husband were occupants and owners of the house and lot and housekeepers with a family prior to the creation of the debt for which the property was subjected. Besides, the denial that appellant was a housekeeper with a family was a substantial denial that her husband was a housekeeper with a family. If appellant objected to the form of the denial she should have moved the court to cause appellee to make it more specific; but the parties having manifestly treated the answer as a denial of the material allegations of the petition, and it also being manifest that substantial justice has been attained, the judgment is *affirmed*.

Little & Slack, for appellant.

Owen & Ellis, G. W. Ray, for appellee.

J. B. CARRAN, ET AL., v. JOSEPHINE MITCHELL.

[Abstract Kentucky Law Reporter, Vol. 1—58.]

Husband and Wife.

Personal property of the wife reduced to possession by the husband belongs to him, and a contract between a husband and wife by which property is settled upon her is void, and cannot be upheld as against creditors in a common-law court. Even in equity such contracts are upheld only where the evidence is clear as to the agreement, and the rights of creditors are protected.

APPEAL FROM OHIO CIRCUIT COURT.

June 1, 1880.

OPINION BY JUDGE HINES:

In this case the personal property claimed by the wife of Mitchell appears to have been coming to her from her father's estate at the time of her marriage, and if it had been in her possession would have vested in the husband. But, being in the hands of the administrator of the estate of the wife's father, it was subject to her equity to a settlement out of it, which equity could only be enforced by proceedings in the proper tribunal before reduction to possession by the husband. In this interval the property might have been set aside to the wife, and in general a court of equity will treat an agreement between husband and wife, by which property is settled upon her, as binding, when the same court would have made a like disposition of the property.

But this is not the province of a common-law court. At law such contracts between husband and wife are void, and in a common-law court cannot be upheld as against creditors. Even in equity they will be upheld only where the evidence is clear as to the agreement, and when the rights of creditors are protected. Whatever might be the view of a chancellor upon the facts of this case when presented in a proper proceeding it is clear that the common-law court had no power to adjudge the property to be in the wife. *Campbell v. Galbreath*, 12 Bush 461; *Garrett v. Gault*, 13 B. Mon. 378; Bishop on the Law of Married Women, Sec. 627.

Wherefore the judgment is *reversed* and cause remanded with directions to dismiss the petition.

McHenry & Hill, for appellants.

GEORGE BOHEIM v. M. HUNTZIKER.

[Abstract Kentucky Law Reporter, Vol. 1—61.]

Suit to Set Aside Conveyance.

Where a conveyance is not shown to have been made for a pre-existing debt, but the consideration seems to have been for cash, it will not be set aside at the instance of creditors.

APPEAL FROM LOUISVILLE CHANCERY COURT.

June 3, 1880.

OPINION BY JUDGE COFER:

In whatever aspect the appellant's claim may be considered we think he has failed to manifest a right to subject the property in question.

There is no foundation laid in the pleadings, nor is there any evidence upon which the sale of the lot to appellee could be brought within the provisions of Art. 2, Chap. 44, Gen. Stat.

It is not alleged that the consideration for the conveyance, or any part of it, was an antecedent debt due to the grantee or to any one else. The allegation is that Mrs. Boheim was indebted in some small sum to her father, and in another small sum to her brother; that, while she had not more than enough property to pay her funeral expenses, for a pretended consideration of \$800, said to be paid in cash, she made and delivered a deed of sale of the lot. It is not alleged, and cannot be safely inferred from anything that is alleged, that the two small debts referred to were the consideration or even a part of the consideration for the conveyance. The only language used which in any way tends to impeach the consideration or the legality of the deed is the expression "pretended consideration", which is not sufficient. But if it were there is no evidence to show that the alleged indebtedness to her father and brother constituted any part of the consideration for the conveyance.

No doubt the will made the testator's debts a charge upon his estate. But that is not enough to entitle the appellant to subject it in the hands of the appellee to the payment of his debt. The appellee has a deed, and neither its consideration nor the bona fides of the transaction have been impeached. The appellants rely alone upon the lien created by the will, the alleged knowledge of the grantee of the existence of his debt, and a misappropriation of the purchase-money by receiving the conveyance in satisfaction of the individual indebtedness of Mrs. Boheim.

It is denied in the answer that the grantee had any knowledge of the existence of the debts, and there is no evidence that he had, and it is not shown that he participated in any misappropriation of the purchase-money, for, as already suggested, there is no evidence that the conveyance was made in consideration of her individual indebtedness. As without such notice or participation in the misappropriation of the purchase-money the land cannot be subjected in his

hands, the appellant must fail on this point also. Sec. 22, Chap. 113, Gen Stat.

Wherefore the judgment is *affirmed*.

L. W. Dembits, for appellant. M. A. & D. A. Sachs, for appellee.

C. CROOKS & CO., ET AL., *v.* WILLIAM R. DILLION.

[Abstract Kentucky Law Reporter, Vol. 1—62.]

Instructions.

There must be both an objection and an exception to an instruction given by the trial court before the Court of Appeals can consider it to determine whether it is erroneous.

Incompetent Witnesses.

Where at a trial under the provisions of the statute the witnesses were excluded from the courtroom, each party giving a list of his witnesses, a witness not excluded from the courtroom is not competent to testify.

APPEAL FROM ROCKCASTLE CIRCUIT COURT.

June 3, 1880.

OPINION BY JUDGE PRYOR:

While doubts may well be entertained as to the identity of the bill of exceptions filed in the court below, we are not inclined to the conclusion that the legislation with reference to the filing or preparation of a bill of exceptions can apply only to cases tried and determined after the passage of the act.

It was designed as a curative statute, and to remedy a defect in the law calculated to deprive litigants of valuable rights upon a mere technicality. We shall proceed, therefore, to consider the case upon its merits. The instructions given for the plaintiff (appellee) are somewhat confused, and, in a case where injustice has been done the defendants (appellants) by the verdict, the court would reverse for the reasons that such instructions are calculated to mislead a jury, but in this case there was no objection to any instruction asked for by the appellee, and an exception reserved only as to the error complained of. There must be both an objection and an exception, and, the appellants having failed to make an objection, the instructions given for the appellee cannot be considered.

We perceive no objections to the instructions given by the court

for the defendant, or to the addition made to them by the court when offered by the appellants. As to instruction No. 8, even if it should have been given to the jury, there is no evidence conducing to show that any improvements were made after the notice given by the appellants to the appellee that the latter could no longer use the switch. The amount of damages sustained by the appellee is not questioned by the appellants, except in their answer denying the existence of any contract between the parties. The improvements or labor of the appellee on the mines or leased property were certainly of great value, and when deprived of the use of the switch rendered them valueless to the appellee. The appellee swears that after the contract he expended near \$1,000 in repairing the tramway, erected buildings of value, made excavations, and other improvements causing a large expenditure of money. The fact of the expenditures incurred and improvements made is not attempted to be controverted by any proof on the part of the appellants, the latter relying almost entirely upon that part of the defense in which it is alleged that no contract was ever made between the parties; and certainly if a contract was made its violation has resulted in pecuniary ruin to the appellee.

The switch constructed by the appellants, as they prove, was at a heavy expenditure, and the fact that the appellee was in no pecuniary condition to construct one himself is persuasive of the fact that he would not have invested his all in improving the mines or the leased estate, without making some contracts with the appellant by which he could get his coal to market. The appellee swears that a contract was made between himself and the appellants, and he gives the terms of the contract and the consideration he was to pay. The entries on the books of the appellants corroborate the statement made by the appellee, in showing that he had made the payments as the contract required.

He is also sustained by the testimony of Luke Jones, who testifies, as a fair, disinterested and intelligent witness, to the effect that the contract was as the appellee states it to have been; that he never heard the right of Dillion questioned until he refused to join the coal ring; that one of the defendants said to this witness that the others wanted him to sign a notice to Dillion that he could ship no longer on the road, and he declined to sign it because he did not want to injure Dillion, and the latter had the right to ship coal over the switch. Crook expressed the opinion that if Dillion was stopped

it would break him up. Crook denies such a conversation, but Jones was at the time acting as agent for the company and was requested to give the notice, and we see no reason for discrediting his statement. These witnesses were all before the jury. Many of them testified in person, and while the plaintiff and his witnesses, or rather their statements, have been flatly contradicted by the appellants and their witnesses, it was the province of the jury to determine the credibility of the witnesses and to pass upon the questions of fact about which there was such a contrariety of testimony. If the contract was made as is alleged by the appellee the injury resulting by depriving him of the use of the switch has not been exaggerated in its effects by the verdict of the jury. It made his possession valueless except the land itself, and wrecked an enterprise that might have contributed to increase largely the value of the small estate owned by the appellee.

While such a speculative inquiry could not have been indulged in by the jury, and should not have entered into the consideration of the question as to the damages sustained, the plaintiff, appellee, was certainly entitled to recover the value of his expenditures and improvements that would not have been made on the property but for the contract, and the value of which has been lost to the appellee by reason of its breach by the appellants. We think the proof develops the fact that this breach of the contract was caused by the refusal of the appellee to enter into an arrangement with the appellants by which they were to mutually agree as to the price of coal and act in harmony, the one with the other. Such a contract, in *our* opinion, was made as is alleged, and we are not disposed to adjudge that the damages awarded are excessive.

It is also assigned for error that the court erred in excluding the testimony of Mrs. Mullins, or rather in refusing to permit her to be examined as a witness. When the case was called the witness, under the provisions of the code, was excluded from the courtroom, each party giving a list of his witnesses. The husband of the witness had been examined by the defendants, and both the husband and wife, or the wife, lived at the house of one of the defendants. She was called to make a statement contradicting the appellee when no foundation was laid for it, and also to be examined in chief when appellants must have known, or could easily have discovered, what she would prove before the trial began.

Her testimony was incompetent, however, for the reason that no

foundation had been laid for attacking the appellee by the witness. Nor was the exclusion of the testimony of the defendant, Davis, erroneous. He should have been first examined as required by the code, and, besides, a part of his deposition was read, and in our opinion the exclusion of his testimony could not have changed the result. As to the exceptions to the testimony, showing the improvements and their value made before the contract was entered into, they were properly disregarded. It was necessary to have this proof in order to show what improvements had been made subsequent to that time, and, besides, the court expressly told the jury that the appellee was not entitled to recover by reason of any improvement made before the contract was entered into. Other exceptions were taken not necessary to notice, as in our opinion they did not, if the error complained of existed, affect the substantial rights of the appellants.

The judgment below is therefore *affirmed*.

Smith & Little, for appellants.

R. M. & W. O. Bradley, W. P. D. Bush, W. G. West, for appellee.

MARTIN MAYHER v. CITY OF LEXINGTON.

[Abstract Kentucky Law Reporter, Vol. 1—68.

Reported in full, 8 Ky. L. 138.]

Validity of City Ordinance.

The power to pass an ordinance to license and exact an annual tax from venders of milk using a milk wagon or other vehicle for delivering their milk to customers in a city must be derived from a direct legislative grant; and the city of Lexington, not having received such a grant, has no power to pass such an ordinance.

APPEAL FROM FAYETTE CIRCUIT COURT.

June 3, 1880.

OPINION BY JUDGE HINES:

The only question presented on this appeal is whether the following ordinance of the city of Lexington is valid:

"That venders of milk who use a milk-wagon or other vehicle for delivering their milk to their purchasing customers in the city of Lexington shall pay in advance to the treasurer an annual tax of \$10 for each wagon or other vehicle so used."

There is no brief for appellee, but, from an inspection of the char-

ter approved February 16, 1867, it appears that if there is power to pass such an ordinance it must be found in Sections 16, 18 or 55. Section 16 applies only to licenses to certain business houses, and Section 18 to licenses for vehicles used or run for hire. Appellant does not appear to come under either of these heads. The license required of him by the court below is not for transacting any business specified in Section 16; nor is the vehicle used by appellant used for hire so as to be covered by Section 18. Section 55 is, in effect, what is usually denominated the "general welfare clause," and clearly does not confer power on the city council to pass such an ordinance. The power to pass such an ordinance must come from a direct grant. *Cooley on Taxation*, 408; *Kniper v. City of Louisville*, 7 Bush 599; *Commonwealth v. Voorhies*, 12 B. Mon. 361; *Dillon on Municipal Corporations*, Secs. 250 and 605.

Judgment reversed and cause remanded with directions for further proceedings.

Houston & Mulligan, for appellant. T. N. Allen, for appellees.

ROBERT M. MEREDITH, ET AL., v. G. W. BARROWS, ET AL.

[Abstract Kentucky Law Reporter, Vol. 1—68, as *Meredith v. Barron*.
Later reported in 2 Ky. L. 208.]

Frankfort Lottery Grant.

The statute empowers the city council of Frankfort to devise a lottery scheme and sell it when devised. The scheme devised was to draw on the ternary plan, and holders of any of these classes have no right to draw a single number lottery; and the sureties of the operator of such lottery cannot be liable for prizes sold by him or any one else, if such prizes be sold in a single number lottery.

APPEAL FROM CAMPBELL CHANCERY COURT.

June 3, 1880.

OPINION BY JUDGE COFER:

As the sureties of Stewart, the appellants cannot in any event be liable for prizes sold by him or any one else, whether claiming to operate under the Frankfort grant or not, if such prizes be sold in a single number lottery. The statute empowers the city council to devise a scheme and to sell the scheme so devised. The scheme was devised, and as devised was to be drawn on the ternary plan, and holders of any of these classes have no more right to draw a single

number lottery than if no lottery franchise had been granted. Consequently the alleged drawings by Barrows of single number lotteries are illegal, and cannot impose upon the appellants any liability whatever, and as they do not claim any interest in the matter except to protect themselves against being held liable on the bond of Stewart for prizes sold by Barrows, their petition was properly dismissed. If Barrows were operating a lottery in conformity to the scheme devised by the council, and claiming to have a right to do so as the owner of a few of the classes of that scheme, then the appellants might have a right to enjoin them, if, as matter of law, only one lottery can be operated under the grant.

Simmons and Dickinson discontinued their cross-petition and are not complaining of the judgment. It would be improper to express any opinion of the question whether the sale of a designated number of classes to each of several persons vests in each a right to have a distinct and separate drawing, or whether the right to operate a lottery is not an entirety under which the owners of classes have collectively the right to operate for their joint benefit according to the proportion which the classes owned by each bears to the whole number of classes in the scheme.

Judgment *affirmed*.

D. W. Lindsay, J. G. Carlisle, for appellants.

P. B. Muir, F. M. Webster, for appellees.

[Cited in *Laurence v. Simmons*, 10 Ky. L. 347, 9 S. W. 163, 1 L. R. A. 172.]

GEORGE BIDWELL v. J. W. JEAN.

[Abstract Kentucky Law Reporter, Vol. 1—61.]

Pleading Pendency of Appeal and Supersedeas.

By failing to plead the pendency of the appeal and supersedeas one waives all advantage he might otherwise have derived from the supersedeas.

APPEAL FROM LOUISVILLE CHANCERY COURT.

June 3, 1880.

OPINION BY JUDGE COFER:

Conceding that the suits brought pending the appeal were a violation of the writ of supersedeas and a contempt of court, still, that cannot affect the validity of the judgments and sales. By failing to plead the pendency of the appeal and supersedeas the appellant

waived all advantage he might otherwise have derived from the supersedeas, and cannot now set it up to affect proceedings to which he failed to make defense.

By permitting the judgments to be rendered and the sales to be made and confirmed without objection he became a party to the sales, and is as much bound by them, until they are set aside by a direct proceeding, as if he had made them himself. Before the judgment pursuant to the mandate of this court was entered he had been divested of all title to and interest in the land as completely as if he had sold and conveyed it away, and on the facts as they really existed he had no right to a deed; but the judgment for it was a cloud upon the title and a menace to the appellee, which he had a right to have removed, and it was not the less so because the appellant may not have had any purpose to enforce the judgment.

That he had a right upon the face of the record to enforce the judgment gave the appellee a right to institute this suit, and conceding that the disavowal in the answer of any purpose to enforce it would have been sufficient to prevent him from afterward doing so, he was not prejudiced by the judgment. A right of action existed independently of the purpose of the appellant which, until declared in his answer, was concealed in his own bosom; and the fact that he had taken the judgment after all the land had been sold under judgments against him, and after he had been divested of all interest in the land, was enough to warrant the appellee in believing it would be enforced unless prevented by injunction.

It seems to us, therefore, that the judgment is right, and it is affirmed.

Jas. S. Pirtle, for appellant. J. L. Clemens, for appellee.

GEORGE W. WHITE *v.* W. C. TUBER, ET AL.

[Abstract Kentucky Law Reporter, Vol. 1—64.]

Release of Sureties.

Sureties on a note are released where by the agreement of the parties payment is postponed for any length of time without their consent.

APPEAL FROM HARDIN CIRCUIT COURT.

June 3, 1880.

OPINION BY JUDGE PRYOR:

No question could well be made as to the liability of the sureties of Coffman if the note in controversy was the only writing affecting the rights of the parties. Having executed the note with the power on the part of Coffman, the principal obligor, to whom it was delivered in blank, to enable him to raise or borrow money and to fill up the blanks, the lender would not be required to make inquiry as to the nature of the contract between Coffman and his sureties, or as to the conditions upon which they signed the blank paper.

In this case, however, when the principal obligor, Coffman, obtained the bond and executed or delivered the note, it was expressly agreed between him and the appellant, and formed a part of the contract between himself and Coffman, to which the sureties were not parties, that if Coffman returned the bond within four months he would return him the notes, Coffman paying interest, etc. The note upon which the sureties were bound or had signed was payable in ninety days; and by the agreement between Coffman and the appellant, made when the note was delivered and as a part of the contract, it was agreed in substance that the money was not to be collected until four months. If the appellant had sued upon the note after it became due, and before the expiration of the four months, Coffman could have defended upon the idea that, having accepted the bond as a consideration for the notes, it was expressly agreed at the time that he was to have four months within which he could return the bond and demand the notes.

If he had the right to return the bond and take up the notes within four months he could not be coerced into paying for the bond until that time expired. The liability of the sureties was enlarged by this additional agreement, and whether it had the effect, as the matter terminated, to endanger their rights or not is immaterial; if the time of payment was postponed for any length of time without the consent of the sureties by an additional agreement binding on White and Coffman it released the sureties. The note, by reason of the last agreement, was not due until four months; and Coffman agreed to pay interest and White to deliver up the notes if they were tendered within that time.

In this view of the case the judgment below must be *affirmed*.

Brown & Chelf, for appellant. Wilson & Hobson, for appellees.

JAMES S. DIGBY *v.* CITY COURT OF NEWPORT, ET AL.

[Kentucky Law Reporter, Vol. 1—170.
Reported in full, 8 Ky. L. 144.]

Power of General Assembly to Create Courts.

Section 1, Art. 4, of the state constitution, vests the judicial power of the state in the Court of Appeals, the courts established by the constitution, and such courts inferior to the Supreme Court as the general assembly may establish, and implies that the legislature has power to establish all such inferior courts as it may deem proper.

APPEAL FROM CAMPBELL CIRCUIT COURT.

June 15, 1880.

OPINION BY JUDGE COFER:

In our opinion Sec. 38, Art. 4, Const. does not relate to police courts. The phrase "municipal courts" is, no doubt, broad enough to include police courts; but the uniform practice of the general assembly, from the adoption of the constitution down to the present time, to establish police courts in towns and villages not entitled to separate representation, and the recognition by the courts of the legal existence of police courts in such towns, shows that this section has not heretofore been regarded as inhibiting the creation of such courts in towns not entitled to separate representation. Many such courts have been established, and proceedings in one way and another have been repeatedly before this court, and their legal existence has not been questioned.

Section 1 of Art. 4 vests the judicial power of the state in the Court of Appeals, the courts established by the constitution, and such courts inferior to the Supreme Court as the general assembly may from time to time establish, clearly implying that the legislature has plenary power to establish such courts inferior to the Court of Appeals as it may deem proper. And Section 88 seems rather to be an additional grant than a limitation upon the power to create courts.

Nor do we regard that part of the act conferring civil jurisdiction upon the city court of Newport as void because the subject of the act is not expressed in the title. Counsel concedes that the title is sufficient to embrace so much of the act as creates a police court and gives it penal jurisdiction; and we are unable to see upon what ground that conferring civil jurisdiction is to be rejected.

The title being sufficient to uphold that part of the act creating the

court, that part regulating its jurisdiction would seem to be so connected as to be upheld also.

Judgment affirmed.

J. R. Hallam, for appellant. R. W. Nelson, for appellees.

NEWPORT STREET R. CO. v. CITY OF NEWPORT.

[Abstract Kentucky Law Reporter, Vol. 1—124.]

Power of City Over Its Streets.

The city does not surrender its control over or its right to improve or repair a street by permitting a street railway to use such street with its tracks, and the city may require the street railway company to contribute toward improving such street.

APPEAL FROM CAMPBELL CIRCUIT COURT.

June 15, 1880.

OPINION BY JUDGE PRYOR:

The question in this case was decided on the former appeal, and we see no reason (if we had the power) for reversing the judgment rendered. The city does not yield its control over or the right to repair and improve a street, by reason of a street railway running over it, and where the city assumes the burden of improving it is just and equitable that the company shall be required to contribute.

This is no longer an open question in this case, and it is needless to discuss it. The instructions were proper, and certainly as favorable to the appellant as the facts authorized.

Judgment affirmed.

F. M. Webster, for appellant. A. T. Root, for appellee.

EMANUEL WOLFE v. WILLIAM G. STEPHENS, ET AL.

[Abstract Kentucky Law Reporter, Vol. 1—122.]

Process of Courts Where Returnable.

By statute original process of the circuit, chancery or quarterly court may be returnable either at Covington or Independence, when the defendant directs its return at the one place or the other and when such direction is given it must be followed.

APPEAL FROM KENTON CHANCERY COURT.

June 15, 1880.

OPINION BY JUDGE PRYOR:

Although the act approved in February, 1860, applies to ordinary matters, the act of February 27, 1876, makes the original process of the circuit, chancery or quarterly court returnable at Covington or Independence, when the defendant elects to have it returned at the one place or the other. This election may be by a verbal direction, and when made it is the duty of the sheriff or officer having the process to make the return as directed by the defendant. The law only applies to defendants living outside of the city of Covington, and by the act of March 19, 1878, the party must live not only outside the city, but outside the first magisterial district. The act approved in 1860 is in effect repealed by the act of 1876, or its provisions enlarged. In this case the direction was given, as the record shows, and the consolidated causes should have been transferred to Independence. There is no escape from the conclusion reached, even if the act of March 19, 1878, has no definite meaning. This would leave the act of 1876 in full force.

Judgment *reversed* and cause remanded with directions to entertain the motion to transfer.

R. D. Handy, for appellant. Eginton & Gray, for appellees.

[Cited, *Brevard v. Stephens*, 2 Ky. L. 227.]

EMILY C. PARSONS *v.* CHARLES W. PARSONS, ET AL.
F. G. BRODIE, ET AL., *v.* SAME.

[Abstract Kentucky Law Reporter, Vol. 1—123.]

Record on Appeal.

The Court of Appeals will determine causes on what the record discloses, and cannot decide a case upon a record made up after the appeal is taken, on the mere suggestion of counsel that it was a defective record.

APPEAL FROM LOUISVILLE CHANCERY COURT.

June 15, 1880.

OPINION BY JUDGE PRYOR:

This case involves the settlement of the estate of Charles B. Parsons, and is made difficult to understand by reason of the many

adverse claims on the part of the heirs, and the confined state of the pleadings. The intelligent report of the commissioners, however, has enabled the chancellor to see the points involved, and is the only guide to this court in ascertaining the alleged errors complained of.

The estate has certainly been recklessly managed, causing its financial ruin and a loss to the widow of a very handsome income. She, confiding in the children, consented to a partition of the estate and looked alone to them for the payment of the debts, and their failure to pay has originated all this trouble. If her sons, or either of them, as her agents, have failed to collect or pay over to her the rents she is entitled to receive her remedy by a separate action, as the claim cannot be asserted in the settlement of her husband's estate. She was entitled to the rents and income as provided by the will of her husband, and the claim by some of the children against the others for advancements made by the mother out of this income was properly disregarded, as it constituted no part of the estate of their father. It was the property of and belonged to Mrs. Parsons, and she could dispose of it as she pleased.

The amounts with which the children have been charged are as nearly correct as is possible to determine under the proof in the case. Although the property of some of the children was sold to pay these debts the amount actually realized from the sale is all that the children who owned this property can claim as against the other heirs. They ought not to have permitted their property to be sacrificed, and whether so or not the amount they have actually paid is all they can be credited by, whether that payment was made in money or by the sale of realty. There can be no doubt but that the relinquishment by the widow was in consideration of the assumption of the debts by the children; and the opinion being based on this view of the case the settlement made is just and equitable, and it was proper to include in the estimate of the debts the sum due the National Bank, as it contributed to improve or has been expended on the common estate.

The claim asserted by Mrs. Brodie by her exceptions, as well as the claim asserted against her by reason of the improvement made on her estate, as properly adjusted; and, in fact, when considering the bad management of the estate and the tangle in which we find the various claims and accounts, no nearer approach to the equities of the parties can be reached than has been by the court below. It is suggested that some of this property has been sold twice, and the

judgment is sought to be amended and the sale vacated after confirmation, and when the chancellor has no control over it. Whether it can be done in an independent proceeding is a question not before us. Such an error does not appear in the record. It is also insisted that Mrs. Roberts should pay the costs, when it appears that Mrs. Brodie was the party objecting. It is maintained that the record is wrong in this respect. It would be a novel proceeding for this court to decide the case upon a record made up after it came to the court on the mere suggestion of counsel that it was a defective record; and, besides, Mrs. Brodie had the right to object, as the chancellor had no power over the judgment.

The judgment is *affirmed* on the original and cross-appeals.

Harrison & McGraw, for appellants. M. Mundy, for appellees.

J. T. WARREN, ET AL., v. C. J. BLOCK, ET AL.

[Abstract Kentucky Law Reporter, Vol. 1—121.]

Husband and Wife.

Where the husband has abandoned his wife she has the right to sue in the husband's name, and at the instance of the wife the chancellor will interpose to prevent a creditor of the husband from depriving the family of the homestead.

Surrender of Homestead.

When a husband abandons his family, leaving them in possession of the homestead, it is evidence of an intention on his part not to surrender his homestead.

APPEAL FROM LOUISVILLE CHANCERY COURT.

June 15, 1880.

OPINION BY JUDGE PRYOR:

It is manifest from the proof that the husband has abandoned his family, and the provisions of the code apply to the case as presented by the record. The wife has the right to sue in the husband's name, and the chancellor, under the circumstances, would interpose at the instance of the wife, in order to prevent the creditor of the husband from depriving the family of the homestead. The creditor has no interest in the homestead or the money given in lieu of it. The presumption is that the husband is still living, and in such a case the homestead is held regardless of the claims of creditors. The fact

of the husband leaving his family in possession is evidence of an intention on his part not to surrender his homestead.

The judgment is *affirmed*.

Jas. S. Pirtle, for appellants. Kohn & Barker, for appellees.

ED MEEK, JR., v. LAWRENCE COUNTY COURT.

[Abstract Kentucky Law Reporter, Vol. 1—125.]

Payment of Guards.

Under the statute providing that "Persons summoned as guards for the safe keeping of prisoners confined in jail shall be allowed \$1.50 per day to be paid out of the treasury of the state, unless ordered to be paid by the county," where the guard is not ordered by the county judge or the circuit court, he cannot recover from the county.

APPEAL FROM LAWRENCE CIRCUIT COURT.

June 16, 1880.

OPINION BY JUDGE HARGIS:

Section 5, Chap. 49, Gen. Stat., provides that "Persons summoned as guards for the safe keeping of prisoners confined in jail shall be allowed \$1.50 per day (all) to be paid out of the treasury of the state, unless ordered to be paid by the county."

In this case the record shows that the county judge did not make the order for the guard, and that the payment therefor was not ordered, but refused to be ordered by the county; so the claim must be paid out of the treasury of the state, or not at all, for there is no statute authorizing the payment of such claims out of the county levy except Sec. 1, Chap. 49, Gen. Stat., and by that section payment out of the county levy cannot be demanded unless the county judge has made the order of record for the guard.

If the circuit court of Lawrence county had power to order the guard then the payment of appellant's claim should have been made out of the treasury of the state. Section 1 conferred the power on the county judge to order the guard so that when the circuit judge should be absent from the county and his court not in session the safe keeping of prisoners subject to its jurisdiction would be under the control of the county judge.

It is an inherent necessity, for which Sec. 5, Chap. 49, provides "that the circuit court shall have power to prevent the escape or rescue of prisoners under its jurisdiction charged with felony." But

as the guard was not ordered by the county judge of Lawrence county, and no application out of term time of the circuit court having been legally made for a guard, and illegally refused or neglected by the county judge, the judgment of the circuit court is *affirmed*.

Castle & Stewart, for appellant.

M. S. BELKNAP v. S. HAYDEN.

[Abstract Kentucky Law Reporter, Vol. 1—119.]

Contract.

A petition on a contract for work performed does not state a cause of action where it is merely alleged that the work and improvement benefited the defendant, but it was not shown that the work was done by the authority of the defendant nor on his premises.

APPEAL FROM WARREN COURT OF COMMON PLEAS.

June 16, 1880.

OPINION BY JUDGE PRYOR:

In this case there is no cause of action alleged as against the appellant. It is not pretended that the work was done by the authority of the appellant, nor does it appear that the improvement was made upon premises owned by him. It is alleged that the improvement benefited the premises of the appellant, and this might be the case although the cistern was dug on the premises of another. Besides, if the contract is that of the appellant, by reason of the agency on the part of Needham, process served on the appellant in Jefferson did not authorize the judgment in Warren. In order, however, to make the latter objection available a motion should have been made to set aside the judgment in the court below. The petition, however, being insufficient, a reversal must be had.

Judgment *reversed* and cause remanded for further proceedings.
Clay & Grider, for appellant. B. F. Proctor, for appellee.

CHARLES FLECKHAM v. SAMUEL BLACK.

[Kentucky Law Reporter, Vol. 1—164.]

Purchase of Store by Married Woman.

The creditors of a husband are not injured by the wife's purchasing a store with money that cannot be subjected to the payment of the husband's debts. A married woman may invest the proceeds of the homestead for her separate use with the consent of the husband, and with an action then pending enabling her to trade as a *feme sole*.

APPEAL FROM JEFFERSON COURT OF COMMON PLEAS.

June 16, 1880.

OPINION BY JUDGE PRYOR:

If the notice for judgment on the bond was defective, the subsequent proceedings of the appellant cure any defect that existed. The execution levied on the property is conceded, and the only question raised by the plea to the merits is that the property was owned by the appellant, and not by the execution debtor. The execution of the claimant's bond prevented the sale, and whether given before or after the return of the execution is immaterial. The levy was certainly made, and appellant asserted his claim of ownership; that question was tried and decided adversely to him. The testimony, we think, shows a sale of the goods to the wife of the debtor. The parties were placed in the possession. No account was kept after the appellant surrendered the possession, indicating that he was the owner; but, on the contrary, the purchaser from him sold the goods, received the money, and even replenished the stock, all on the idea that Mrs. Kesel was the owner of the property. Conceding, however, that Mrs. Kesel was the owner, and this is a fact that cannot be questioned, the proof further shows that the goods were to be held liable for the purchase money, and that the appellant was holding the possession in conjunction with the wife of the debtor to satisfy the lien. That such was the agreement of the parties is clearly established, but it is maintained that such an agreement cannot affect the rights of the creditors.

It certainly could not if Kesel were the purchaser, but in this case the wife was the purchaser, and with means that the creditor could not have subjected to the payment of his debt. This money the wife was entitled to, at least, by the agreement made with the husband, and a suit was then pending to enable her to act as a feme sole, and when determined, this money that belonged to the wife, and which could not have been subjected by the creditor, was to be paid over to the appellant.

After the judgment was obtained authorizing the wife to act as a feme sole, the money, or part of it, was paid over to appellant, leaving a balance due him. Such a sale to the wife never vested the husband with title, and particularly when the vendor was in the occupancy, or had the possession jointly with the wife until his money was paid. In what manner is the creditor injured when a

purchase is made by the wife with money that cannot be subjected to the payment of this debt, and for enabling her to hold it as a feme sole? Facts may exist evidencing fraud, but here the proceeds of the homestead were invested by the wife for her separate use, with the consent of the husband, and with an action then pending enabling her to trade as a feme sole.

The vendor of the wife held the goods by continuance with her as a partner until his debt was paid. If so, her goods cannot be taken until his debt is satisfied, or the appellees must pay him the balance due. The wife is not complaining. The judgment as to appellant is *reversed* and cause is remanded for further proceedings. This case should go to equity if the lien of appellant is not conceded.

Harrison & McGraw, for appellant.

Jas. P. Burton, Kohn & Barker, for appellee.

FARMERS' BANK OF KENTUCKY *v.* THOMAS M. WHITE, ET AL.

[Abstract Kentucky Law Reporter, Vol. 1—120.]

Failure of Sheriff to Return Fi. Fa.

The sheriff is required to return the fi. fa. within thirty days after the return day, but it is held to be a reasonable excuse for not doing so that within that time the sheriff left it with the clerk for record, under the belief that the law required the return thereon of "No sale for want of bidders" to be recorded where the delay in its return was caused by the failure of the clerk to record it.

APPEAL FROM CAMPBELL CIRCUIT COURT.

June 16, 1880.

OPINION BY JUDGE COFER:

Although the statement in the original response, to the effect that the fi. fa. was left with the clerk of the Campbell Circuit Court before the return day, and was retained by him continuously until September 19, is inconsistent with the statement in the first paragraph of the amended response, yet that inconsistency is not very material.

The only issue in the case was whether the sheriff had a reasonable excuse for his failure to return the fi. fa. within thirty days after the return day, which was the first Monday in June. It is,

therefore, not material where the fi. fa. was between the test and return day, or even after that, provided it has been shown that at any time within the thirty days after the return day it passed out of the sheriff's hands and remained out, under circumstances which afford a reasonable excuse for not returning it, until after the expiration of the thirty days. As against this proceeding the sheriff had thirty days after the return day to return the fi. fa. If he had accidentally lost it on the last of the thirty days that would have been a good defense to this motion, although there had previously been ample time and opportunity to make the return. It is sufficient that a good excuse for failing to make the return exists on any day of the thirty provided it continue to exist to the end of that period. We are, therefore, of the opinion that there was no error in overruling the demurrers or in permitting the amended response to be filed.

That the fi. fa. was left with the clerk of the Campbell Circuit Court a second time, and remained there until in September, is not disputed in the evidence. Nor is it denied that the object in leaving it the second time was to have the return "no sale for want of bidders" recorded. Counsel argue that the Act of 1878 does not require such a return to be recorded, and that, the fi. fa. and levy having been previously recorded, the sheriff should have returned it to the Kenton Circuit Court, and from this deduce the conclusion that the fact that the clerk failed to return it to the sheriff until after the expiration of thirty days from the return day, though called upon for it, furnishes no reasonable excuse for not returning it.

We concur in the premises but not in the conclusion. It is evident that both the sheriff and the clerk in good faith believed the law required the return "no sale for want of bidders" to be recorded in the Campbell Circuit Court clerk's office. There is no reason why the sheriff should leave the fi. fa. with the clerk, or why the latter should receive it, unless they thought the law required it; and that the clerk did not return it when called for, shows that he still regarded it as his duty to record the return.

That statute was new and had not been construed by the courts, and the lawyers and judges might well differ as to its meaning. Under such circumstances we think the record discloses a reasonable excuse for the failure to return the execution within thirty days after the return day. (*Neal & Co. v. Taylor*, 9 Bush 380.) The deputy sheriff testified that he called upon the clerk two or three times for

the execution, but was told the return had not yet been recorded and it was not given to him.

This is not contradicted by anyone. The deputy clerk says that he does not recollect that he called more than once, but that is not a contradiction of the statement by the other that he called several times.

Judgment *affirmed*.

McKee & Finnell, for appellant. R. W. Nelson, for appellees.

M. DOYLE, ET AL., v. TRUSTEES OF BELLEVUE.

[Kentucky Law Reporter, Vol. 1—168.]

Legislative Power—Municipal Charter.

The general assembly has the power to apply the charter of one municipality to another by so declaring, but where it only provides that such parts of the charter of one municipality shall apply to another one in so far as applicable it is its duty to also declare *what* parts are applicable, and where it fails to do so relative to the improvement of streets the municipality has no right to improve such streets at the cost of the lot owners.

APPEAL FROM CAMPBELL CIRCUIT COURT.

June 16, 1880.

OPINION BY JUDGE COFER:

The only authority claimed by the trustees of the town of Bellevue to cause the streets of the town to be improved at the cost of the owners of adjacent property is the following:

Section 2 of an act to amend the charter of Bellevue, approved February 28, 1871, provides that "All the laws of the city of Newport pertaining to the government of said city, as well as those to the making, improving and repairing streets, alleys, ways and public grounds out of the general and special taxation, as of the control and management of its affairs and its officers, so far as applicable, are hereby adopted and applied to said town of Bellevue."

Section 5 of an act to further amend the charter of Bellevue, approved April 21, 1873, provides: "That hereafter the said board, by a vote of at least two-thirds of the trustees, upon a call of the yeas and nays, shall, without any petition therefor, have the same power to order and require the improvement or repair of any street,

alley or public way, and to levy and collect a special tax therefor, that said board has by law when such improvements or repairs are petitioned for by the requisite property holders."

We entertain no doubt of the power of the legislature to apply the charter of one municipality to another by simply so declaring, but that has not been done in this case. The act does not declare that the charter of Newport is adopted and applied to the town of Bellevue. The language is that so much of said charter as is "applicable" is adopted. What parts are applicable? In the primary sense of the word all the provisions of the charter of Newport are applicable, i. e., capable of being applied to Bellevue. But it is evident that the legislature did not use the word in that sense, for if it had intended to adopt all the provisions of the Newport charter as part of the charter of Bellevue, the words "so far as applicable" would not have been used.

It follows, then, that the word "applicable" must have been used in the sense of "suitable," and in that sense it is the duty of the legislature, and not of the courts, to decide what parts of the charter of one town are applicable to another town. We are, therefore, of the opinion that the attempt made in the 4th section of the Act of 1871 to adopt as a part of the charter of Bellevue so much of the laws of Newport as are applicable, was abortive, and that the trustees of Bellevue have no right to improve the streets at the cost of lot owners.

The reasonableness of this conclusion will be more readily discovered from the following remarks based upon a careful examination of the charter of Newport in the case of *Shriver v. Newport*, just decided. That charter provides (Sec. 6, Art. 1864, p. 143, Laws of Newport) that in all additions made to the city since January 23, 1864, lot owners shall be assessed for the cost of grading adjacent streets, while other parts of the charter require that the city shall pay for grading streets in other parts of the city. Which of these is applicable to Bellevue? The legislature had undoubted power to apply either of these provisions to Bellevue, but it has not indicated which one it intended to apply, and the courts are powerless to decide which should be applied.

The Act of 1873 does not aid the appellees. It merely dispenses with the necessity for a petition, and provides that by a vote of two-thirds the trustees may require the streets to be improved, and levy and collect a special tax without a petition, just as they were previ-

ously authorized to do when petitioned. It confers no new power, but merely provides for dispensing with a prerequisite deemed to have been heretofore necessary, before exercising a power supposed already to exist.

We are, therefore, of the opinion that the proceedings of the trustees, so far as they sought to subject the property of the appellants to special assessment to pay for improving Fairfield avenue, are without authority of law, and void.

Judgment *reversed* and cause remanded with directions to dismiss the petition.

R. W. Nelson, for appellants. F. M. Webster, for appellees.

[Cited, *Town of Bellevue v. Peacock*, 89 Ky. 495, 11 Ky. L. 702, 12 S. W. 1042, 25 Am. St. 552.]

J. N. QUIGLEY, ET AL., v. J. B. QUIGLEY'S EX'RS.

[Abstract Kentucky Law Reporter, Vol. 1—123.]

Res Adjudicata.

Where one, in a suit sought to have the terms of a will construed, and to have his rights thereunder determined, secures a judgment in such action, he cannot thereafter, in another suit, set up and have determined a claim to a part of such estate and have the will construed over again. The first action bars the second.

APPEAL FROM BALLARD COURT OF COMMON PLEAS.

June 17, 1880.

OPINION BY JUDGE COFER:

In his first suit the appellant sought a construction of the will, and that he "be adjudged all his rights under said will, and that the estate be divided," etc. In that suit the court construed the will, and that construction was carried into execution, and the judgment there is a bar to this action. It does not matter that the clause giving the appellant a fund for his education was not set up or construed in that case, or that he has received nothing on that account. His suit was to construe the will, and was broad enough to cover all he was entitled to under it. But if it had not been it would still constitute a bar to this action.

That for which he sued then and that sued for now he was entitled to, if at all, in the same right and against the same person.

[**all constituted**, in the form of suit adopted, but one cause of action, and **all that pertained** to it he was bound to set up in order that he might present his whole case at once. It is not now a question whether he in terms sought to recover the fund given for his education, or whether that matter was in terms adjudicated upon.

He sued to have the will construed, for a judgment adjudging to him all his rights under the will, and for a settlement of the estate. This comprehensive action embraced the whole liability of the executors to him under the will. The educational fund was an item of their liability to him, and its adjustment was a proper subject for consideration in a suit to settle and distribute the estate,—which was directed by the last sentence of the former judgment to be made. It reads as follows:

“It is further adjudged that the plaintiff is entitled to one-sixth of any other estate left by the decedent after the payment of the debts of decedent, the costs of administration, and making the children of decedent equal in advancements with the father of plaintiff.”

This finally determined the ultimate disposition of the whole estate, and must be held a bar to this action.

Judgment *affirmed*.

Reeves & Nichols, for appellants. Q. Q. Quigley, for appellees.

CRATE OWENS v. COMMONWEALTH.

[Abstract Kentucky Law Reporter, Vol. 1—124.]

Criminal Law—Indictment.

An indictment is sufficient which alleges that the accused did unlawfully shoot and wound a named person with an intention to kill him.

APPEAL FROM PULASKI CIRCUIT COURT.

June 17, 1880.

OPINION BY JUDGE PRYOR:

The indictment contains every allegation necessary to constitute the offense. It is alleged that the accused did unlawfully shoot and wound Henry Turner with an intention to kill him.

This was not only a shooting at, but with the intention to kill. The court did not abuse its discretion in refusing to continue the case,

and, from the testimony of Turner, if the witness had been present, the verdict should have been the same.

Judgment affirmed.

Morrow & Newell, for appellant. P. W. Hardin, for appellee.

WILLIAM DECOURCEY'S ADM'R, ET AL., *v.* J. N. L. DICKENS, ETC.
SAME *v.* SARAH DICKENS' ADM'R.

[Abstract Kentucky Law Reporter, Vol. 1—260.]

Duties of Trustee.

Where one receives money as trustee, in which another is entitled to the income from it during her life, and others own the fund subject to the rights of the life owner, and the writing creating the trust does not contain a promise by the trustee to pay the amount to any one, he is, notwithstanding this fact, liable to answer to the remaindermen and pay over such fund to them at the death of the life owner.

Statutes of Limitation.

When a trustee holds a fund on which one is entitled to draw the interest during her life, the owners of the fund cannot maintain an action to recover it during such lifetime, and the statute of limitations will only begin to run as against them from the date of her death.

Payment.

When a trustee holding \$600 for the rightful owners pays them \$300 and takes a receipt in full or a transfer of their interests, such payment and transfer is not final and will not discharge the debt.

Chose in Action Accruing to a Wife.

A chose in action accruing to a wife during coverture survives to her husband and does not pass to her personal representatives.

APPEAL FROM CAMPBELL CHANCERY COURT.

June 17, 1880.

OPINION BY JUDGE COFER:

The writing sued on does not contain a promise to pay the \$600 to any one. But the money having been received by DeCourcey to be held by him until "said legatees come to the age of 21 years," he had a right to retain it until that time, when a cause of action accrued to the person or persons entitled to the money. Under the will of Mrs. Carroll, Mrs. Dickens was entitled to the use of the

money during her life, and when the "said legatees" reached their majority the right of action to recover the money from DeCourcey was in her, and not in the "said legatees."

Nor did the writing entitle them to sue for and recover it. They are not parties to the writing, nor does it purport to be for their benefit, but expressly recognizes the right of Mrs. Dickens to the interest during her life, which excludes the idea that the money was to be paid to her two sons when they should arrive at the age of twenty-one years. The fact that DeCourcey, in 1858, long after both the sons had attained their majority, and when, according to the theory of appellant's counsel, the whole was due and payable to them, paid them but \$150 each, instead of \$300 each, which was due them if they were the owners of the fund, shows that he did not regard the whole as belonging to them, and that he regarded Mrs. Dickens as entitled to the interest during her life. These transactions show, also, that at their date he had the \$600 in his hands, and amounts to a recognition of his liability to some one for the money; and as Mrs. Dickens was, as the writing in 1843 shows, entitled to the interest during her life, he continued to be liable to her for the interest as long as the money remained in his hands. As he does not appear ever to have paid out to any one more than \$300, he was liable to her for interest on \$600 up to January, 1858, and on the remaining \$300 up to her death.

As before remarked, the writing executed by DeCourcey contained no promise to pay the principal to any one; but as Mrs. Dickens was, by the terms of that writing, entitled to the interest as long as she lived, it would follow that her sons were not entitled to sue for the principal during her life, and consequently that the statute of limitations did not run against them until after her death, unless on the idea that she stood in the relation of a trustee for them.

She died in 1869, and then a right of action accrued to her children, and their suit was commenced in 1873, less than five years after her death. The important question in the case, then, is this: A right of action accrued to Mrs. Dickens, in 1853, the time when the younger of her two sons arrived at the age of 21 years; she was then and until her death a married woman. Did limitation run against her?

Section 5, Art. 4, Chap. 71, Gen. Stat., provides that "If a person entitled to bring any of the actions mentioned in the third article of that chapter (of which this is one) was, at the time the cause of

action accrued, a married woman the action may be brought within the like number of years after the removal of such disability or on death of the person, which ever happens first, that is allowed" to a person not under disability.

If it had been an ordinary debt due to the wife, the statute would perhaps apply, because in that case, although the right of action would be in the wife, it would be for the benefit of the husband, and might be sued for and recovered by him as if in terms payable to him; but in this fund James Dickens had no interest as husband, and consequently no right of action. It follows, therefore, that the statute of limitations presents no bar to the recovery of so much of the principal debt as is unpaid, viz.: the sum of \$300 with interest at 6 per cent. from the time of Mrs. Dickens' death.

Counsel contended, however, that as no mention is made in the writing executed by DeCourcey of any of Mrs. Dickens' children except her two sons, and as DeCourcey was a stranger to the will of Mrs. Carroll he was bound to the two sons and to them alone. As we have already said more than once, the paper contains no promise to pay the money to anyone. The right of action arises out of the facts. DeCourcey had certain money in his hands which we may assume he supposed would belong to Mrs. Dickens' two sons at her death.

Supposing them to be the only persons interested in the fund, he paid them \$300 of the money. The balance remained in his hands at her death, and while it is yet in his hands, or in the hands of his representatives, the other children of Mrs. Dickens come forward and assert their claim, which, as between them and their brothers, is valid. Why may they not recover it? A borrows money of B, which he supposed to be B's money, but before he pays it C comes forward and in a joint suit with B asserts that the money in fact belonged to him (C). Can he not recover? We do not suppose anyone could answer in the negative. What wrong is done to DeCourcey in this case by allowing the other children of Mrs. Dickens to recover? It is not pretended that he has paid more than \$300. He owes the balance and must pay it to the two sons, or to the other children of Mrs. Dickens. If he pays to the former they must pay it over to the latter, and the parties all being before the court, the chancellor will do justice at once by decreeing the money to these ultimately entitled to it.

But it is contended that the two sons transferred the fund to De-

Courcey. He owed \$600, and paid \$300 of it to the persons whom he says were entitled to the whole, and takes their transfer of the balance. This is no more than if he had simply taken a receipt in full, and that a payment of a part in the discharge of the whole debt is not a good defense, is a position which needs no argument or authority for its support.

It may be said that the debt was not then due, and that payment of a part before due in discharge of the whole is a good accord and satisfaction. But it is not true that these payments were made before the debt was due. DeCourcey might have been sued and compelled to pay the debt long before that, and that it was previously due is the ground upon which the appellants rest their plea of the statute of limitations.

The chancellor rendered judgment against the appellants for \$360, with interest, that being three-fifths of the \$600. In this we think he erred to this extent: DeCourcey paid to the two sons, in 1858, \$300. So far as the writing executed by him showed the two sons were entitled to the whole. He made no agreement to pay to anyone, and there is nothing to show that he knew that anyone else was interested in the money; and to the extent that he paid to them he should have credit. No part of the judgment in favor of the administrator of Mrs. Dickens can be sustained.

A chose in action accruing to the wife during coverture survives to her husband, and does not pass to her personal representative. The petition shows that James Dickens, the husband of Mrs. Dickens, survived her, and the right of an injunction bond and for interest survived to him, and suit for these should have been in his name. It is, therefore, not necessary to consider whether the plea of the statute was good in this latter case or not.

Judgment *reversed*, and cause remanded with directions to dismiss the petition of Dickens' administrator, and to render judgment in the other case for \$300, with interest from May 1, 1869.

E. W. Hawkins, for appellants.

Stevenson & O'Hara, for appellees.

[Cited, *Onions v. Covington &c. Bridge Co.*, 107 Ky. 154, 21 Ky. L. 820, 53 S. W. 8; *Davis v. Willson*, 115 Ky. 639, 25 Ky. L. 21, 74 S. W. 696; *Holmes v. Lane*, 136 Ky. 21, 123 S. W. 318.]

SIDNEY GREER *v.* COMMONWEALTH.

[Abstract Kentucky Law Reporter, Vol. 1—120, as *Sidney v. Commonwealth.*]

Criminal Law—Murder.

Since the jury alone in a murder case is authorized to determine the effect of evidence introduced, and to pass upon its sufficiency, the Court of Appeals will not disturb its verdict because the evidence may seem weak.

Instructions.

Where the exclusion of testimony, though it be properly excluded, may have impressed the jury improperly, the circumstance requires some explanation to the jury on the subject so that it may not be wrongly impressed, and they may understand its bearing.

Instructions on Manslaughter.

When the trial court undertakes to instruct the jury on manslaughter it should tell the jury of what manslaughter consists.

APPEAL FROM FLOYD CRIMINAL COURT.

June 17, 1880.

OPINION BY JUDGE PRYOR:

The consideration of the case is made somewhat embarrassing from the fact that the testimony against the accused is of so slight a character as certainly to create much doubt in the mind of the court as to the correctness of the finding below; still, as the jury alone is authorized to pass upon the facts, this court must look alone to the manner in which the law of the case was presented to the jury.

The killing of the deceased must have been a cruel and an inhuman act, and the party guilty should be brought to punishment. The evidence against the accused is purely circumstantial, and, when considering the entire case, tends as strongly to incriminate others as the accused. Other parties had been arrested charged with the same offense, but upon hearing before an examining court, or in the investigation before the grand jury, were discharged. The accused in this case, in addition to the facts relied on as removing any suspicion of his being the guilty party, attempted by a chain of circumstances to show that other parties had caused the murder of the deceased; and while this court does not pretend to adjudge them sufficient to fasten the crime on others, facts were sufficiently developed authorizing the court to call the attention of the jury to

that branch of the defense. If the facts and circumstances proven conduced to show that another had committed the crime they might have been, if true, inconsistent with the guilt of the accused, unless he in some way aided or abetted in its commission.

The exclusion of the testimony in regard to the statement of Nicholson, who was charged with the murder, may have impressed the jury with the belief that his innocence had already been established, and, while the evidence was properly excluded, the circumstances of this case required some explanation or instruction to the jury on the subject. No objection can be perceived to the instructions given; but in a case where the juror's mind might be led off from the consideration of facts and circumstances material to the defense, by some ruling in regard to the admission of testimony, it is proper to explain to the jury so that they may understand its bearing. The necessity for such explanations seldom arises, but in the case before us the proper conduct of the case, we think, required it.

The jury, when instructed on the subject of manslaughter, ought also to have been told what manslaughter was; and while the defense may not have been prejudiced by it, it was proper to give the instruction in the usual form. We forbear to discuss the testimony or its effect, as this is particularly the province of the jury; but for the errors indicated, the judgment is *reversed* and cause remanded for further proceedings consistent with this opinion.

John M. Burns, James York, F. A. Hopkins, R. C. Burns, for appellant. P. W. Hardin, for appellee.

[Cited, *Etly v. Commonwealth*, 130 Ky. 723, 113 S. W. 896.]

BAKER FLAUGHER v. COMMONWEALTH.

[Abstract Kentucky Law Reporter, Vol. 1—119.]

Criminal Law—Forgery.

Where an accused is charged with forging an assignment of a note, evidence of attempts to sell the note is not admissible, and an instruction to the jury to the effect that if the accused uttered it by offering to sell it he was guilty, is erroneous.

Possession of Note.

Where, in a prosecution against an accused for forging an assignment of a note, it is shown that the note came into his possession lawfully, the law presumes that it belongs to him, and if so he has a right to sell it, and hence the offer to sell is not evidence of fraud.

APPEAL FROM BRACKEN CRIMINAL COURT.

June 18, 1880.

OPINION BY JUDGE COFER:

It seems to us the indictment is good. The assignment alleged was prima facie a valid transfer, and not only purported to vest the title to the note in the appellant, but to subject Weldon to the liability of an assignor. It does not appear that Weldon had been discharged by laches before the paper was uttered. The assignment is without date, and if it were dated and the dates showed that the assignor was prima facie released the indictment would still be good, because facts may exist which might render him liable although he appeared to be released. Beside this, the paper imports a liability, and its fraudulent publication is none the less a crime because there happens to be a legal defense independent of the fact that the assignment is forged.

But we think the court erred in permitting the commonwealth to give evidence of attempts to sell the note, and in instructing that if he uttered it by offering to sell, he was guilty. We have held that the facts constituting the uttering charged must be alleged (*Commonwealth v. Williams*, 13 Bush 267), and it follows that only such acts as are charged can be proved. Such evidence did not tend to show an intention to defraud.

There is no evidence whatever that the note did not come lawfully into his possession, and as he had possession the law presumes he was the owner. If the owner, he had a right to sell it, and the offer to sell was not evidence of fraud; and, if it were, he was charged only with an intention to defraud Weldon, and an intention to defraud generally could not be proved.

The evidence conducing to prove that the assignment was a forgery was not very strong, and there was no evidence whatever that the appellant knew it was a forgery except the fact that he had it in his possession, and nothing to show that the assignment was not on it when the note came to his hands unless it is some declaration made by the appellant.

Under these circumstances it was of the utmost importance to the appellant that all extraneous matter should be rigidly excluded, and that nothing not warranted by the issue should be submitted to the jury.

Judgment *reversed* and cause remanded for a new trial upon principles not inconsistent with this opinion.

W. P. D. Bush, for appellant. P. W. Hardin, for appellee.

[Cited, *Commonwealth v. Cochran*, 143 Ky. 807, 137 S. W. 521.]

R. A. THOMAS v. M. B. MOODY, ET AL.

[Abstract Kentucky Law Reporter, Vol. 1—123.]

Reservation in Deed to Wife and Children.

Where in a deed from a husband and father to his wife and children the grantor reserves the power to sell, he conveys the title subject to such power.

APPEAL FROM HENRY CIRCUIT COURT.

June 18, 1880.

OPINION BY JUDGE COFER:

The deed from Thomas to his wife and children was, in substance and effect, a mere declaration of trust, by which he vested them with the title, but constituted himself their trustee with power to sell if he should deem it to their interest.

We think the validity of the power may be sustained on another ground. The same deed which gave the grantees all the title they had reserved to the grantor the power to sell, and they took the title subject to the power.

It seems to us, in either view, the title of the appellees is good against the children of R. A. Thomas, and the judgment is *affirmed*.

E. P. Thomas, for appellant. Carroll & Barbour, for appellees.

FRANKLIN OWSLEY v. SUSAN L. OWSLEY.

[Abstract Kentucky Law Reporter, Vol. 1—124.]

Petition for Divorce.

A petition for divorce on the ground of abandonment, which falls to allege that the abandonment was without the fault of the plaintiff, does not state a cause of action.

APPEAL FROM ROCKCASTLE CIRCUIT COURT.

June 19, 1880.

OPINION BY JUDGE HARGIS:

The appellant failed to aver in his petition that the alleged abandonment by his wife for one year was without his fault, or that he was not in fault. The appellee having demurred to the petition, his attention was called to its condition, and he should have cured the substantial defect in it by amendment, if he could have truthfully done so. As he has failed to make the allegation that he was not in fault, upon which his right to a divorce depended by the express terms of the statute, his petition, even after amendment, does not state any cause of action, and the court below properly dismissed it. *Epling v. Epling*, 1 Bush 74.

Wherefore the judgment is *affirmed*.

Van Winkle & Rodes, for appellant. W. G. Welch, for appellee.

JIM TALBOTT, ET AL., *v.* JAMES L. CLARKSON, ET AL.

JAMES L. CLARKSON, ET AL., *v.* JAMES M. CLARKSON, ET AL.

Decedent's Estate.

Where a testator does not dispose of all of his property in distribution of the undivided portion thereof, the heirs and devisees may be made to account for advancements made to them.

Advancements.

The valuations fixed by devisees on property given them by the testator will not control the chancellor as to such values; nor is the claim of the testator that he has made them all equal, or given one more than the other, conclusive of that fact.

Attorneys' Fees of Executor's Attorneys.

Where one of the devisees institutes a proceeding to have the will construed, which is in fact a claim by said devisee against the others, the fees of plaintiff's attorneys are not payable by the executor out of the estate, and a claim for such fees should be rejected.

APPEALS FROM HARDIN CIRCUIT COURT.

June 26, 1880.

OPINION BY JUDGE PRYOR:

In a former opinion rendered by this court (*Clarkson v. Clarkson*, 8 Bush 655) it was expressly decided that the testator failed to devise his whole estate, and in distributing that part of it undivided the heirs and devisees were properly made to account for advancements made. The valuation fixed on the property given the devisees

by the testator cannot control the chancellor in the question of value; nor is the declaration of the testator that he has made them all equal, or given one more than the other, conclusive of that fact, if at all admissible to establish it.

In the case of Talbott, notwithstanding the declaration made by the curator, it is manifest that the two had a settlement, and the receipts exhibited show that Talbott was not indebted to the testator. If he was indebted to the estate the representatives must look to Talbott's estate, and not to the inheritance of his children from their grandfather. Mrs. Talbott and her husband received nothing by way of advancement, except some articles for housekeeping and perhaps a salve; and, the proof conducing to show that the other heirs received a like advancement, it was proper for the commissioner to decline, as he did, to make any charge against the heirs for such advancements. In the settlement made by the testator and Talbott in the year 1848, the witness who was present says that it was a settlement of all past transactions between them, and that the testator then paid Talbott \$1,500 when a final receipt was given.

It is not pretended that Clarkson ever gave to Talbott any money or property after this settlement, and the effort is now being made to go behind the settlement and charge the children of Talbott with some old debts that the testator paid as his surety. If such debts were paid the estate of Talbott is liable for them. There is no proof showing that the payments were made as advancements; but on the contrary the weight of the proof establishes the fact that Clarkson was indebted to Talbott. The court very properly excluded from the credits to J. L. Clarkson the note for \$200 due in 1842. It was a stale claim, and some other evidence was required than the mere exhibition of the note. This note was made payable to one who was the executor, and had access to the papers of the testator; and while it may be a just claim, the production of such a paper, under the circumstances, in the absence of other proof, is not sufficient evidence of the indebtedness. In regard, however, to the charge made against the executors for rents, slaves, etc., if they were even survivors, it would not affect the judgment as to these appellees, as the appellants would then have received, by way of advancements, more than the appellees.

The only valid objection to the judgment arises on the appeal of Talbott. It appears that the attorney of the executors had been allowed and paid the sum of \$500, for which they received a credit

in their settlement; and yet the additional sum of \$500 is allowed them for services rendered in having a proper construction of the will of the testator. Talbott, and others who claimed that a part of the estate was undevised, brought a suit in equity seeking a construction of the will; while the executors, who were devisees and claiming together with others of the devisees the entire estate, insisted that the whole of it passed under the will. It was in fact a claim by one devisee against the other, and to allow the claim of the executors would be to pay them out of a fund going to the appellants for contesting in their individual right the right of the latter to receive it. This view of the question is made the more equitable when it clearly appears that the executors had already been allowed \$500 to pay attorneys. The attorney is doubtless entitled to his money, but the executors should pay it out of their own pockets, or in conjunction with the devisees whose interests were identical.

The judgment on the appeal of *James L. Clarkson v. James M. Clarkson* is *affirmed*, and the judgment on the appeal of *Talbott v. James L. Clarkson* is *reversed* and cause remanded for further proceedings.

T. B. Fairleigh, J. W. Lewis, C. G. Wintersmith, for appellants.
M. H. Cofer, for appellees.

STONE v. COMMONWEALTH.

Criminal Law—Forgery.

An indictment is sufficient which sets out a writing of a certain import in haec verba, and charges that it "was forged and uttered with the design to defraud the Clark County National Bank."

APPEAL FROM CLARK CIRCUIT COURT.

June 29, 1880.

OPINION BY JUDGE HINES:

The indictment in this case does not allege, as counsel insists, that the writing was drawn on the Clark County National Bank with a view to defraud that bank. The charge in the indictment is that a writing of a certain import, which is set out in haec verba, "was forged and uttered with the design to defraud the Clark County Na-

tional Bank." The evidence fully supports the allegations of the indictment.

It is immaterial on whom the order was drawn if the design is shown to have been to defraud the Clark County National Bank. II Wharton on Criminal Law (7th ed.), Sec. 1456.

There is neither a variance nor a failure of proof. The indictment is good, and, as the substantial rights of the appellant do not appear to have been prejudiced by any ruling of the court below, the judgment is *affirmed*.

John B. Houston, for appellant. P. W. Hardin, for appellee.

CASH HALSEY v. COMMONWEALTH.

[Abstract Kentucky Law Reporter, Vol. 1—121.
Later reported in abstract, 1 Ky. L. 402.]

Criminal Law—Murder.

An application for a continuance of a trial in a murder case, showing the names of absent witnesses and that their testimony was material, and facts showing that their presence may be procured in a reasonable time at the trial, and which shows reasonable diligence in procuring their attendance under the circumstances, if sworn to should be granted.

Instruction.

Where, in an instruction in a murder trial, the jury were told, in effect, that if the accused wilfully shot and killed the deceased in self-defense they must acquit, but adding that if the jury believed beyond a reasonable doubt the killing took place in a mutual fight, begun and continued to the fatal shot by the accused, he is "not excusable" by reason of any counter violence endangering his safety by the deceased, unless the accused in good faith attempted to retire from the conflict or the force used by the deceased was greatly beyond what was necessary to his protection, and where the jury is left to determine the legal meaning of the term "Not excusable," and is not informed of the degree of the offense from which the accused is not excusable under the acts supposed in it, such an instruction is erroneous.

APPEAL FROM CLARK CIRCUIT COURT.

June 29, 1880.

OPINION BY JUDGE HARGIS:

The appellant was indicted on the 22nd day of May, 1879, in the county of Fayette for the alleged offense of murder. At the same

term he applied for and was granted a change of venue to the adjacent county of Clark. At the November term, which was the first thereafter in that county, the accused moved for a continuance based upon his affidavit, which set forth the names of the absent witnesses, the facts he believed they would prove, that he had caused subpoena to issue for them to the proper counties more than one month before that term of the court, and that the subpoenas were served as early as October 28 on all of the absent witnesses, except Joe Aleen, who it appears resided in Fayette county, was a witness before the examining trial and was before the grand jury which found the indictment. The materiality of the evidence of the absent witnesses appears from the affidavit, and seems to be conceded.

But it is contended for the commonwealth that due diligence was not exercised by the appellant to obtain the presence of his witnesses. The appellant had been confined, since his indictment, in the jail of a different county from that to which the prosecution had been changed for trial. His uncle, Daniel Kent, upon whom he relied to prepare for his trial and attend to the obtention and execution of the subpoenas, was too sick to perform that service. The record does not show the appellant to be a man of wealth, or sustained by numerous or powerful friends, and the aid at his command seems to have been this sick uncle. He was compelled, from imprisonment without bail, to rely upon the clerk and sheriff to perform their duty, which they appear to have faithfully done.

The absent witness, Joe Aleen, was shown to have been within the jurisdiction of the court at the examining trial in May, 1879. It does not appear from the record that he is beyond that jurisdiction, or that it is unreasonable to expect that the presence of the witness can be obtained at the next trial. The prosecution seems to have had some information of his whereabouts, as the commonwealth caused a subpoena to issue for him to Estill county. The appellant was entitled to the presence not only of Joe Aleen but all of the absent witnesses named in his affidavit, upon whom process had been executed. He seems to have done all that his situation permitted, and used all the process allowed by law.

It was the first term when a trial could have been had in the venue authorized by law. It does not appear that an unnecessary or unreasonable delay was sought by appellant in his application for a continuance. Presumptions should not be indulged against him unless they were based upon competent evidence, or facts legally before

the court. A continuance should have been granted. *Morgan v. Commonwealth*, 14 Bush 106.

By instruction No. 3, the jury were properly told, in effect, that if the accused willfully shot and killed the deceased in self-defense they must acquit him. But a qualification was added that if the jury believed, beyond a reasonable doubt, the killing occurred in a mutual fight, which was begun and continued to the fatal shot by the accused, he is not excusable by reason of any counter violence endangering his safety by the deceased, unless the accused in good faith attempted to retire from the conflict, or the force used by deceased was greatly beyond what was necessary to his protection.

By this qualification the jury are left to determine what the term "not excusable" means in law. They mean that the accused was guilty, but of what the court did not inform the jury, who might have decided, without applying to them any very unreasonable diversity of meaning, that they meant he was guilty of murder or of manslaughter. There is nothing in that instruction informing the jury of the degree of the offense from which the accused is not excusable, under the acts supposed in it.

While those acts might destroy the whole defense of the accused and demonstrate his guilt of the highest degree of the offense charged, yet, if they were done without malice and in sudden heat and passion his offense would be manslaughter because of the absence of malice, a necessary ingredient to constitute murder, notwithstanding he never attempted to retire from the conflict nor was resisted by force greatly beyond what was necessary to protect the slain.

In order to have the benefit of the proposition contained in the whole of that qualification, with its subordinate qualifications, it was not necessary that the evidence should satisfy the jury beyond a reasonable doubt that the fight was mutual. That fact, as it tends to negative the charge of murder, is established by a preponderance of evidence. These views should have been embodied in the third instruction, or in another in direct reference to its qualification by them.

Wherefore the judgment is *reversed* with directions to grant appellant a new trial, and for further proceedings not inconsistent with this opinion.

Morton & Parker, John B. Houston, for appellant.

P. W. Hardin, for appellee.

[Cited, *McClurg v. Igleheart*, 17 R. 913, 33 S. W. 80.]

COMMONWEALTH v. A. H. HOGAN, ET AL.

Sheriff's Indemnifying Bond.

The taking and return by the sheriff of an indemnifying bond furnishes no defense to him against an action by the claimant for an illegal seizure or conversion of his property under an attachment against the property of another person. Such a bond is for the protection of the sheriff, and can be sued on only by him.

APPEAL FROM BOYD CIRCUIT COURT.

June 29, 1880.

OPINION BY JUDGE HARGIS:

This appeal involves the identical question which was fully considered and decided by this court at its present term in the case of *Lewis v. Mansfield*, 78 Ky. 460. In that case it is held that the taking and return by the sheriff of an indemnifying bond, under the provisions of Sec. 211, Civ. Code, furnishes no defense to him against an action by the claimant for an illegal seizure or conversion of his property under an attachment against the property of another person. The bond is for the protection of the sheriff, and can be sued on only by him. The obligation is to him, and its conditions are against any damage he may sustain by reason of the levy. Chap. 6, Title 14, Civ. Code, applies solely to executions and distress warrants.

Wherefore the judgment is *reversed* with directions to sustain the demurrer of the appellant to the answer of the appellees, and for further proceedings consistent with this opinion.

K. F. Prichard, Hampton & Hagar, for appellant.

S. G. Kinver, L. T. Moore, for appellees.

W. T. DAVIS v. BENJAMIN HARDIN, ET AL.

[Kentucky Law Reporter, Vol. 1—165.]

Rule of Construction.

When the court is satisfied, from an examination of a written instrument, that to follow a rule of construction will defeat the intention of the parties to it such a rule will not be followed.

Provision for Wife and Children.

When a husband makes provision for his wife and children, he should be presumed to do so with the intention to give the whole to the wife for life, remainder to the children, unless a contrary intention is shown from the terms of the provision or from the facts and circumstances attending it.

APPEAL FROM MERCER CIRCUIT COURT.

June 29, 1880.

OPINION BY JUDGE COFER:

The objection of all construction is to discover and effectuate the intention of the person whose writing is to be construed; and, while technical rules may aid in many cases in accomplishing the result sought, they are not to be followed when the court is satisfied, from an examination of the instrument, that to follow the rule is to defeat the intention. *Turman v. White's Heirs*, 14 B. Mon. 560.

While the court must deduce the intention from the words of the instrument, those words may be read in the light of attending circumstances and the relation of the parties. A father making provision for his child, and that child's children, may well be supposed to have intended them to take jointly. They are all of his blood, and the natural objects of his bounty. But when a husband makes a conveyance to his wife and their children there is less reason to suppose that he intended they should take as joint tenants, whereby his bounty may, by her death, pass into the hands of a stranger, even as against himself.

No doubt Jones desired and intended that his wife should enjoy the property equally with their children, but it would be unnatural to suppose that he intended to invest her with an estate which might pass from her to strangers to his blood. This case seems to illustrate the utter unreasonableness of applying to every deed or will the same rule of construction, with a view to ascertain the intention of the grantor.

The record shows that soon after the deed was made the grantor and his wife separated and were divorced; that each subsequently married again, and died, leaving a child of the second marriage surviving. If we apply to this case the rule announced in *Cessna v. Cessna*, 4 Bush 516, and *Foster v. Shreve*, 6 Bush 519, the result will be that the bounty of the grantor will be entirely divested from his family and blood, and the child of his wife's second marriage will receive an interest in the property, while his own child will be excluded.

It would be far more reasonable to suppose he intended to give his wife a life estate, remainder to their children, as was held in *Webb v. Holmes*, 3 B. Mon. 404. The deed provided for the enjoyment of the use of the property by the grantor and his wife, unless the trustee should take possession of it, and that in that case

he should pay the entire rent and profits to the wife, thus showing that it was not his purpose to make present provision for the child then in being, or those that should be hereafter born. His only child was then an infant of tender years, and this also conduces to show that he did not intend it should take a joint interest with the mother.

When a husband makes provision for his wife and children, he should be presumed to do so with the intention to give the whole to the wife for life, remainder to the children, unless a contrary intention is manifest from the terms of the provision or from the facts and circumstances attending it.

None of the cases referred to by counsel for appellant are of that character, except the case of *Powell v. Powell*, 5 Bush 619. We have examined the deed construed in that case, and find that, like the deed in *Webb v. Holmes*, it was a deed interpartes between Calvin of one part and Wm. Powell of the other. It was held in *Webb v. Holmes* and *Foster v. Shreve* that under such a deed the wife took only a life estate, and it would have been so held, no doubt, in the *Powell* case if the question had been made and the attention of the court had been called to the former case. But the child claimed only one-half of the estate, and the case of *Webb v. Holmes* does not appear to have been cited.

That it was not intended to overrule *Webb v. Holmes* is shown, not only by the fact that the case was not mentioned, but by the further fact that *Foster v. Shreve* was decided afterward and approved and followed *Webb v. Holmes*.

Judgment affirmed.

Thos. C. Bell, P. B. Thompson, Jr., C. A. & P. W. Hardin, for appellant. O. S. Poston, P. B. Thompson, Sr., for appellees.

[Cited, *Bullock v. Caldwell*, 81 Ky. 566, 5 Ky. L. 576; *Fletcher v. Tyler*, 92 Ky. 145, 13 Ky. L. 421, 17 S. W. 282, 36 Am. St. 584; *Koenig v. Kraft*, 87 Ky. 95, 9 Ky. L. 945, 7 S. W. 622, 12 Am. St. 463; *Frank v. Unz*, 91 Ky. 621, 13 Ky. L. 226, 16 S. W. 712; *Stevens v. Bakrow*, 104 Ky. 181, 20 Ky. L. 465, 46 S. W. 686; *Goodridge v. Goodridge*, 91 Ky. 507, 13 Ky. L. 70, 16 S. W. 270; *Meriwether v. Meriwether*, 10 Ky. L. 669, 10 S. W. 272; *Smith v. Upton*, 12 Ky. L. 27, 13 S. W. 712; *Brand v. Rhodes' Adm'r*, 17 Ky. L. 97, 30 S. W. 597; *Stewart v. Robinson*, 25 Ky. L. 66, 74 S. W. 652; *McFarland v. Hatchett*, 118 Ky. 423, 26 Ky. L. 276, 80 S. W. 1185; *Hall v. Wright*, 121 Ky. 16, 87 S. W. 1129, 27 Ky. L. 1185; *Bowe v. Richmond*, 33 Ky. L. 173, 109 S. W. 359; *Hall v. Moore*, 32 Ky. L. 56, 105 S. W. 414; *Harkness v. Lisle*, 132 Ky. 767, 117 S. W. 264.]

PATRICK M. HILL v. BENJAMIN ANDERSON'S ADM'R, ET AL.

[Abstract Kentucky Law Reporter, Vol. 1—269.]

Title to Real Estate—Lien.

The mere existence of a lien on real estate, if set up by one having a right to be heard, is no defense to the owner's claim to title, which cannot be defeated except by some one holding a superior claim.

APPEAL FROM HARRISON CIRCUIT COURT.

September 7, 1880.

OPINION BY JUDGE COFER:

The trustee, Benjamin Anderson, was seized of the lot in contest for the use of Mrs. Hill, and there having been living issue of the marriage, he is entitled to all estate by the curtesy. Sec. 1, Art. 4, Chap. 52, Gen. Stat., which is the same as the provision of the Revised Statutes. The trustee sought to defeat the claim of the husband on the ground that he was not seized for the use of the wife during her life, because, as he alleged, her father was tenant by the curtesy to his deceased wife. But the evidence wholly fails to sustain that defense.

It is inferable from the record that the trustee is dead, and one claiming to be his administrator seems to have filed an answer, though we do not perceive what interest he, as administrator, can have in this litigation.

It appears from the report of sale in the suit of Masser v. Anderson, a copy of which is in this record, that a person bearing the same name, as the administrator of Benjamin Anderson, became the purchaser. If the property was sold under a judgment in a suit to which the appellant was a party, the purchaser may have acquired a good title; but the sale and purchase should have been set up in an appropriate pleading, and the record of that proceeding should have been exhibited so as to show that the appellant was bound by the judgment and sale. The mere existence of the lien, even if set up by one having a right to be heard, is no defense to the appellant's claim, which is a legal claim and one that cannot be defeated except by some one holding a superior claim; and no such claim having been manifested, the judgment must be *reversed* and the cause remanded for further proper proceedings.

The appeal prosecuted was granted in this court, and the motion to dismiss is *overruled*.

A. Perrin, C. W. West, for appellant.

T. F. Forman, for appellees.

JESSIE J. CASKEY v. JANE CASKEY.

[Abstract Kentucky Law Reporter, Vol. 1—230.

Reported later in abstract, 4 Ky. L. 726, and in full p. 811.]

Alimony Pending Divorce.

Until such time as a husband in a divorce proceeding establishes by evidence the dereliction of the wife without his fault, he is legally bound to support her. Pending the suit, the wife being without adequate means, is entitled to alimony.

Allowance of Alimony.

The allowance of \$125 for the temporary support of the wife, pending a divorce, is a reasonable allowance where the husband's estate is worth \$4,000 or \$5,000.

APPEAL FROM MORGAN CIRCUIT COURT.

September 7, 1880.

OPINION BY JUDGE HARGIS:

The pleadings and affidavits present the sole question, whether the appellee is entitled to alimony pending suit brought by her for divorce against her husband, the appellant. There being nothing else in the record by which to decide the question, the reasonableness or unreasonableness of the separation cannot now be considered, and cannot be decided until the evidence shall have been taken in the legal mode. It is true the appellant controverts the material allegations of his wife's petition. But until he establishes by affirmative evidence, her dereliction without his fault, he stands under legal demand to support her. The mere fact that the suit is pending, incomplete in its preparation, is alone sufficient to entitle the wife, who has no adequate means of her own, whether plaintiff or defendant, to alimony during its pendency. 2 Bishop on Marriage and Divorce (6th ed.), Sec. 384; Sec. 6, Art. 3, Chap. 52, General Statutes; *Cravens v. Cravens*, 4 Bush 435.

The allowance of \$125 for the appellee's temporary support is certainly very reasonable out of an estate, as the record shows, of \$4,000 to \$5,000, now owned by appellant. It is to be presumed that the court did not make the allowance as compensation, either in whole or in part, to the appellee's counsel, because that question depends upon the final result of the action, and the judgment complained of does not direct any compensation to the attorneys.

Judgment *affirmed* with damages.

John T. Hazelrigg, for appellant.

Henry & Cooper, for appellee.

FRANK BETZ & CO. v. HARRY A. ALTEMEYER.

[Abstract Kentucky Law Reporter, Vol. 1—281.]

Ownership of Promissory Note.

Where the owner of a note discounts it at a bank, and renewals were executed to the bank, it sufficiently shows that the original owners have parted with their ownership, and that such note or its renewals belong to the bank, and the bank could not be divested of ownership until it was paid the amount of said note.

APPEAL FROM CAMPBELL CIRCUIT COURT.

September 7, 1880.

OPINION BY JUDGE COFER:

The petition and amendment fail to disclose a cause of action, without reference to the question whether the taking of a new note or notes operated to discharge the appellee from liability on the original note, and as the judgment must be affirmed on that ground it is not necessary to decide whether, as matter of law, the appellee is released.

The petition shows that the note was discounted at the bank of Taylor & Son, and that the renewals were executed to the firm. This is sufficient to show that appellants have parted with their title to the original note, and that it became the property of the bank; and there is nothing to show that they have paid the bank, or have in any way become reinvested with title to that note.

The mere renewal of the note by Andreas and the appellee did not have that effect. If the renewal is to be taken to be a satisfaction of the old note then it is extinguished. If the renewal was not a satisfaction then it continued to belong to the bank until the new note was paid, and it is not alleged that this has been done.

The facts stated show that the original note, if not satisfied, belongs to the bank and not to the appellants, and consequently in any aspect of the case the appellants manifested no cause of action.

Wherefore the judgment is *affirmed*.

John S. Ducker, for appellants. F. M. Webster, for appellee.

COMMONWEALTH v. RICHARD MARTIN.

[Abstract Kentucky Law Reporter, Vol. 1—279.]

Criminal Law—Indictment for Forgery.

An indictment attempting to charge forgery is insufficient which only charges that the accused "did unlawfully forge an instrument," etc., and the further allegation that "this writing was so forged and falsely made." Such allegations but state conclusions of law, and not statements of facts required by the code.

APPEAL FROM McCRACKEN CIRCUIT COURT.

September 7, 1880.

OPINION BY JUDGE HINES:

The demurrer to the indictment was properly sustained. The allegation that appellee "did unlawfully forge an instrument," and the further allegation that "this writing was so forged and falsely made," are but statements of conclusions of law, and not statements of facts constituting the offense as required by the code. *Stowers v. Commonwealth*, 12 Bush 342; *Commonwealth v. Williams*, 13 Bush 267.

Judgment affirmed.

P. W. Hardin, for appellant.

COMMONWEALTH v. J. W. LESTER.

[Abstract Kentucky Law Reporter, Vol. 1—276.]

Criminal Law—Bail Bond.

Where it is not determined by the justices whether a charge against an accused is for grand or petit larceny, but they approve a bail bond, and the prisoner gave the bond and was released from custody, his surety will not be allowed to say that the accused had committed or was afterward charged with a greater offense, and that the bond is therefore void.

APPEAL FROM FULTON CIRCUIT COURT.

September 8, 1880.

OPINION BY JUDGE PRYOR:

It is difficult to determine from the record in this case whether the accused was arrested on the charge of grand or petit larceny. He was arrested for larceny, and when brought before the two

justices they had the right to determine whether it was the one offense or the other in order to pass upon the question of bail. It seems they heard no proof as to the accused, but took from him a bond for his appearance before the county judge, by whom he had elected to be tried. If he had been charged with a felony no bail could have been taken; but as under the warrant he might have been convicted of a lesser offense, it is to be presumed that the benefit of such a conclusion was conceded to the accused and the bond accepted. This presumption should be indulged not only upon the idea that the justices were informed as to the law, but for the reason that, as no certain charge had been made, the action the least oppressive to the accused should have been taken. The prisoner gave the bond and was released from custody, and his surety ought not to be allowed to say that accused had committed or was afterward charged with a greater offense, and therefore the bond is void.

The judgment quashing the bond is *reversed* and cause remanded for further proceedings.

P. W. Hardin, for appellant. H. A. & R. T. Tyler, for appellee.

CINCINNATI SOUTHERN R. CO. *v.* S. C. LYON.

[Abstract Kentucky Law Reporter, Vol. 1—280.]

Building a Railroad Fence.

There is no statute requiring a railroad company to pay not only for building the fence, but also for keeping it in repair.

APPEAL FROM FAYETTE COURT OF COMMON PLEAS.

September 8, 1880.

OPINION BY JUDGE PRYOR:

On the issue made the appellant was entitled to conclude the argument. There is no evidence showing that the appellee or his landlord ever received any compensation for erecting a fence bordering on the road, and if either had, there is no statute requiring the railroad company to pay not only for building the fence, but also for keeping it in repair. We find nothing in the record in the way of proof authorizing an instruction on this branch of the case. While it may not have worked an injury to the appellant, for the

reason already indicated, the judgment must nevertheless be *reversed*. A new trial should be awarded, as the appellant should have been allowed to conclude the argument.

Kinhead & Kinhead, for appellant.

COMMONWEALTH *v.* BARRY GEE.

[Abstract Kentucky Law Reporter, Vol. 1—281.]

Criminal Law—Concealed Weapons.

Where in an indictment it is charged that one is guilty of "carrying concealed a deadly ———," the omission of the word "weapon" will not render the indictment bad. The context unmistakably indicates the word omitted, and enables the court to supply it with certainty.

APPEAL FROM MONROE CRIMINAL COURT.

September 8, 1880.

OPINION BY JUDGE COFER :

The omission of the word "weapon" did not render the indictment bad. It is alleged that the offense charged was committed by carrying concealed upon and about his person a deadly weapon. This was sufficient for all purposes. Besides this, the word "weapon" should be supplied. The words, "the offense of carrying concealed a deadly ———," unmistakably indicate the omitted word, and enable the court to supply it with absolute certainty.

Wherefore the judgment is *reversed* and the cause remanded with directions to overrule the demurrer.

P. W. Hardin, for appellant.

S. S. JOHNSON *v.* GEORGE W. ROWE.

[Abstract Kentucky Law Reporter, Vol. 1—274.]

Inadequacy of Selling Price of Real Estate.

Where the price of the sale of real estate is grossly inadequate, very slight circumstances will be seized upon by the chancellor for the purpose of granting relief against such a sale.

Description in Conveyance of Real Estate at Judicial Sale.

The fact that the conveyance describes the property cannot cure a levy that is void for want of description.

APPEAL FROM WARREN CIRCUIT COURT.

September 8, 1880.

OPINION BY JUDGE PRYOR:

In this case it is unnecessary to discuss the question as to the inadequacy of the price paid by the appellant for the land in controversy. Where the sacrifice is so great as to trouble the conscience of the chancellor, very slight circumstances will be seized on for the purpose of granting the relief sought. The levy, it seems to us, is so indefinite and uncertain as to render the sale void. Where this property is located does not appear, either by the levy or the return made by the officer, evidencing the sale under which the appellant claims.

The fact that the conveyance describes the property cannot cure a levy that is void for want of description. It is not the personal knowledge the sheriff may have as to the location of the property that is to guide him in the execution of the deed, but the description given in the levy or return made; this must identify the property so as to enable him to make the conveyance. "Levied on a lot on the corner of Green and Main streets," without designating the corner or describing the buildings upon it, cannot be said to be a valid levy; nor could an ejectment be maintained on such a return. While equitable grounds may exist for cancelling the deed this ground is sufficient, and the relief was properly granted. The appellee, having sought the aid of a court of equity for the restoration of his title, should be compelled to do equity.

The validity of the debt is not denied, and the judgment should have been so extended as to subject the property to its payment. For this reason the judgment is *reversed* and cause remanded for further proceedings.

James M. Rose, James M. Hines, for appellant.

William Lindsay, J. W. & J. R. Gorin, for appellee.

LYDIA A. CHAPPELL v. C. W. MUNGER.

[Abstract Kentucky Law Reporter, Vol. 1—269.]

Election of Trustees.

Where a law requires the election of additional trustees no election can be held until the law goes into effect. The creation of additional trustees by reason of subsequent legislation cannot affect the rights of those then in office.

APPEAL FROM NICHOLAS CIRCUIT COURT.

September 8, 1880.

OPINION BY JUDGE PRYOR:

An election could not have been held until the law went into effect under which these trustees were required to be elected. No vacancy occurred, for the reason that the trustee then acting held his office until his successor had qualified; and the mere fact that this successor could not qualify for a year or longer did not make the office vacant. The creation of additional trustees, by reason of subsequent legislation, did not affect the rights of those then in office until the trustees under the last enactment had been elected and qualified.

Judgment *affirmed*.

Charles Little, for appellant. Ross & Kennedy, for appellee.

COMMONWEALTH v. LEWIS BRIGHT.

[Abstract Kentucky Law Reporter, Vol. 1—274.]

Right of Court to Suspend Tavern Keeper's License.

The county court is authorized by a lawful proceeding to suspend the license of a tavern keeper and deprive him of his business under it, but since March 13, 1876, when the general assembly created a criminal court for the counties of Fleming, Morgan, Nicholas, Lewis, Rowan and Greenup, and took away from the circuit courts of said counties jurisdiction in criminal cases or penal causes, an appeal from the judgment of the county court for suspending such license, being of a penal nature, should have been taken to the criminal court. The circuit court has no jurisdiction in such appeal.

APPEAL FROM FLEMING CIRCUIT COURT.

September 8, 1880.

OPINION BY JUDGE HARGIS:

March 13, 1876, the general assembly established a criminal court in the 14th judicial district, composed of the counties of Morgan, Fleming, Nicholas, Lewis, Rowan and Greenup. Section 1 of the law enacted "That it shall have all the jurisdiction in criminal and penal causes and proceedings which the circuit courts of this commonwealth now have, or which may hereafter be conferred upon it

by law," and that "It shall take the place of the circuit courts of the said counties in such criminal and penal jurisdiction." Section 4 stated that "said circuit courts shall no longer have cognizance of any criminal or penal causes or pleas of the commonwealth in said counties."

During the existence of the criminal court the appellee's tavern license was, without notice, temporarily suspended by the Fleming County Court. Thereafter, upon summons duly served, he was absolutely deprived of his license from keeping a tavern upon the charge of violating his tavern obligation. To correct those orders which he alleges were erroneous and unjust he appealed to the circuit court of Fleming county, and that court reversed and vacated the judgment and orders of the county court and restored the appellee's license and privileges under it. Of this judgment the commonwealth complains by this appeal, on several grounds, none of which are necessary to be noticed except the objection to the jurisdiction of the Fleming Circuit Court. That court had no jurisdiction or cognizance, as we have seen, of any penal causes or pleas of the commonwealth so long as the criminal court existed.

The proceedings of the county court were highly penal in their nature. If the acts charged, upon which its proceedings were based, had been proceeded upon by indictment against appellee, if found guilty he would have been subjected to fine and in default of payment confined in the county jail. While the county court had no power to fine or imprison him, it did have power by lawfully proceeding to suspend his license and deprive him of his business under it, which might entail a heavier pecuniary loss than the highest fine which the law imposes for such acts. The appeal from the county court should have been taken to the Fleming Criminal Court, and not to the circuit court, as the latter had no jurisdiction of the cause. Whatever errors may have been committed by the county court the circuit court had no power to correct them.

The judgment of the circuit court is therefore *reversed* with directions to dismiss the appellee's appeal from the county court.

P. W. Hardin, for appellant. W. J. Hendrick, for appellee.

R. C. HARRIS' ASSIGNEE *v.* W. B. ENGLAND.

[Abstract Kentucky Law Reporter, Vol. 1—271.]

Bankruptcy—Assignment.

When property is owned by a person at the time of the filing of a petition in bankruptcy, his assignment thereafter to another will convey nothing.

APPEAL FROM MARION CIRCUIT COURT.

September 8, 1880.

OPINION BY JUDGE HINES:

The conveyance by the register to Spalding, assignee of Harris, operated to vest the assignee with title to all the property and choses in action belonging to Harris at the time of the filing of the petition in bankruptcy; and therefore, the claim in controversy being the property of Harris at the time of the filing of the petition in bankruptcy, September 1, 1876, and the assignment by Harris to the appellee having been made subsequent to that date, appellee took nothing by this assignment.

This is not an action or suit by the assignee in bankruptcy against one claiming an adverse interest. The fund for distribution, out of which the claim was to be paid, was in the hands of the court, and those entitled to it were awaiting the order of distribution. The assignee in bankruptcy had no cause of action against appellee or anyone else. The fund belonged to him as assignee, but the time of distribution depended upon the court in whose custody it was, and the fact that the litigation continued and the fund was not distributed until more than two years after the appointment of the assignee in bankruptcy, cannot affect his right to receive it whenever distributed.

Appellee had no standing in court, and no right to litigate the question presented by his alleged assignment. Section 5057 of the Federal Statutes applies as well to suits by creditors against assignees as to suits by assignees. The error of the court below was in entertaining appellee's complaint, because he was barred by the statute. Appellant, assignee in bankruptcy, is entitled to this fund, and the judgment is *reversed* and cause remanded with directions to so adjudge.

Belden & Shuck, C. A. Johnston, for appellant.

Russell & Arritt, for appellee.

SAMUEL ADAMS' ASSIGNEE *v.* ALVIN BRANCH, ET AL.

[Kentucky Law Reporter, Vol. 3—178.]

Conveyance by Insolvent Debtor.

One must be just before he is generous, and a conveyance of the greater part of one's estate to his son and son-in-law at a time when the grantor is indebted cannot be upheld as against the claims of creditors.

Action by Assignee of Insolvent Debtor.

The assignee of an insolvent debtor may maintain an action to set aside a conveyance of real estate by his assignor made to defraud creditors.

APPEAL FROM NICHOLAS CIRCUIT COURT.

September 9, 1880.

OPINION BY JUDGE PRYOR:

It is not material to inquire what were the motives prompting Samuel Adams to dispose of his land to his son and son-in-law. He was at the time indebted, and the conveyance of more than two-thirds of his entire estate cannot be upheld as against the claims of creditors. One must be just before he is generous, and while a gift to one's children by way of advancement or otherwise may be made, if endangering the claims of existing creditors the chancellor will not hesitate to disregard all such transactions. In this case there was a consideration paid by the son and son-in-law for the land, and we are inclined to conclude from the testimony that they were not apprised of the pecuniary condition of the father, but accepted the bonds in good faith, and at least had no knowledge of any design on the part of the father to defraud his creditors.

The proof conduces also to show that Samuel Adams, at the date of the bonds in 1872, believed that the price to be paid for the land would satisfy his debts; but in this he was mistaken, and so far as this record shows, but little of the money received was applied in that way, and his debts are unpaid. The land sold was worth not less than \$50 per acre when these conveyances were made, or when the bonds were executed. It is, then, an admitted fact that his creditors are unpaid and his children have received deeds to the land for which they paid scarcely one-third of its value; and we see no reason why the sale to the son and son-in-law should not be held as constructively fraudulent, although they did purchase in good faith. There may be actual fraud on the part of the grantor and contributive fraud on the part of the grantee.

If the grantees have an equity in this case, and we think they have, they should be required to pay the claims of creditors existing at the time of the sale to them in February, 1872, or the land conveyed to them should be sold for that purpose. They have a superior equity to the extent of the money paid by them, and the land they purchased should only be sold to pay the debts existing at the time. The fact that some of the debts were renewed did not amount to a satisfaction or discharge of the original obligation, unless there had been some change in the security. The son, Millard F. Adams, has sold twenty acres of the land received by him, and the purchase having been made, as we think, in good faith, the purchaser will not be disturbed, but Millard F. Adams must account for its value less the amount paid per acre for it, estimating the whole tract purchased by him at \$1,500. If any part of the purchase money due the father remains unpaid, unless the notes are in the hands of innocent parties, the same will be subject to the claims of antecedent creditors.

The conveyance to this land was not made until the year 1874, and no discovery of the fraud was made, or could well have been made, by any of the parties until long after the sale took place.

The relation of son and son-in-law to the grantor, and with but little if any change in the use of the land, presented no reason for inquiry on the part of the creditors, and this is certainly not a case where the chancellor should search for facts to bar a recovery by reason of the lapse of time. That the assignee can maintain this action has been settled by this court in the case of *Boone v. Hall*, 7 Bush 66, and in *Payne v. Able*, 7 Bush 344. What debts were in existence at the time of the bond in February, 1872, and are yet unpaid, does not sufficiently or definitely appear, and the case should go to the commissioner in order that this may be ascertained. When the indebtedness is ascertained the land should be sold, first to satisfy the amount paid by Branch and Adams in their purchase, with interest from day of sale, Adams to account for the land sold by him in the manner already stated, and the balance be applied to the claims of creditors, or the appellees, Branch and Adams, may elect to retain the land and pay the debts.

The claims of creditors subsequent to the sale of the land in February, 1872, should be denied. No question of rents, interest or improvements should be allowed unless the land, by reason of the improvements on the tract purchased by either, has by improvements

placed upon it been enhanced in value beyond \$50 per acre. Nothing in this opinion is to preclude the appellees from contesting the validity of any claim that may be presented to the commissioner. (Cited, *Wood v. Goff's Curator*, 7 Bush 59; *Lowry v. Fisher*, 2 Bush 70.)

Judgment reversed and cause remanded for further proceedings consistent with this opinion.

Judge Hargis not sitting.

Hargis & Nowell, Reid & Stone, for appellant.

Ross & Kennedy, for appellees.

[Cited, *Stiger v. Jackson*, 139 Ky. 495, 31 Ky. L. 435, 102 S. W. 329.]

SHADRACK CASEY AND WIFE v. W. L. PENCE.

[Abstract Kentucky Law Reporter, Vol. 1—278.]

Conveyance in Satisfaction of Legacy.

Whether a conveyance is made in satisfaction of a legacy must be determined from all the facts and circumstances surrounding the action; and where a pleading denies that it was the intention of the testator to satisfy the legacy by the conveyance the issue is formed and should be tried.

APPEAL FROM SHELBY CIRCUIT COURT.

September 9, 1880.

OPINION BY JUDGE HINES:

Whether the conveyance to appellants and the children was intended as a satisfaction or ademption of the legacy is to be determined from all the facts and circumstances surrounding the action. On the facts as they appear in this record we would not hesitate to say that the conveyance was intended as a satisfaction, or to be in lieu of the bequest; but what other evidence appellant might be able to produce to show that such was not the intention of the testator we are unable to determine, and as the reply denies that it was the intention of the testator to thus take away the bequest, and issue was formed upon that point, that should have gone to trial. *Duncan's Trustee v. Clay*, 13 Bush 48.

The court erred in sustaining the demurrer to the reply, and for that reason the judgment is reversed and cause remanded for further proceedings.

L. A. Weakly, for appellants.

Caldwell & Harwood, for appellee.

A. J. TURPIN, ET AL., v. J. A. FUQUA, ET AL.

[Abstract Kentucky Law Reporter, Vol. 1—262.]

Judicial Sale of Real Estate.

The court will not order the whole of a lot to be sold where it is not necessary to pay the amount of a lien adjudged against it.

Retaining Lien.

A lien, valid against purchasers, may be retained to indemnify the grantor against an encumbrance on the land given in consideration of that conveyed by him.

Vendor's Lien.

While the release by the vendors of their lien on a portion of the property will not release it as to the residue, it cannot increase the burden on such residue.

APPEAL FROM DAVIESS CIRCUIT COURT.

September 11, 1880.

OPINION BY JUDGE COFER:

As the judgment appealed from must be reversed on other grounds, it is not necessary to decide whether the cause was prematurely heard.

There is no sufficient description of the property in the pleadings or judgment. The court should not have ordered the whole lot to be sold, unless necessary to pay the amount of the lien adjudged against it. The suit was commenced before the present code went into effect, and, therefore, the provisions of Sub-sec. 2, Sec. 694, Bullitt's Code, do not apply. (See Section 837.)

We incline to the opinion that a lien valid against purchasers may be retained to indemnify the grantor against an encumbrance on the land given in consideration of that conveyed by him. The land so received stands in lieu of purchase-money, and the case is analogous to the payment for land in cash notes and a lien retained to secure the payment of the notes or to secure the liability of the assignor,—which has been repeatedly recognized by this court as valid, even against purchasers.

Nor do we perceive any valid objection to the substitution of the lot of appellants to be sold in lieu of the lot conveyed by Mitchell to Fuqua. Whatever burden rests upon the latter's lot must be borne by the lot he conveyed to Mitchell; and as the time when Mitchell was bound by the terms of the deed to remove the encum-

branches has passed, Fuqua had a right to proceed by action to ascertain the amount of encumbrance and have it removed, and the chancellor, to prevent multiplicity and circuity, will place the burden at once where it must ultimately rest.

The release by the vendors of their lien on a portion of the property did not release it as to the residue, but neither can it increase the burden on such residue. The lien attached to every part of the property equally according to its actual value, and, as the vendors cannot increase the burden upon any part by releasing their lien upon another part, no injury was done to one sub-purchaser by releasing the lien as to any other.

The commissioner found a balance of \$1,337.96 to be due on the purchase price. This, however, is not quite correct. The Pottinger lot sold for about \$595, but the vendors are only charged with \$540, the balance being deducted for costs and the fees of attorneys. Only the legal costs should have been deducted. They had no right to reduce the amount of the credit by deducting the fee of their attorneys, and thereby to compel Mitchell or his vendees to pay it.

The receiver collected some rents, which he paid over to or for the vendors, and it is suggested that he may have collected an additional sum. These should be credited on the purchase-money. When these additional credits are ascertained and deducted from \$1,337.96 the balance should be apportioned between the lots sold to Buckner, McHenry and Fuqua, and the Bailey lot, none of which have contributed any part of the money already paid. The apportionment to be according to their respective actual value, and for the amount so to be ascertained, chargeable to Fuqua's lot, judgment should be rendered against appellants' lot, the pleadings being first so amended as to describe the property.

Unless the value of the several lots named above is agreed upon, the cause should be referred to the master to take proof and report. We do not think the whole burden should be thrown upon the Bailey lot, even if it was sufficient to pay the balance due. Bailey bought it and paid a part of the purchase-money; the contract was rescinded, and for the purchase-money paid, Bailey has a lien which gives as good an equity as the appellants', and they have no right to insist upon casting upon that lot any greater burden than if the contract had not been rescinded.

Many other points are made in the elaborate brief of appellants' counsel, all of which have been considered, but it would extend this

opinion too much to respond to them all unless it was necessary to a proper decision of the cause. We have passed upon the points which seem to us to be important to a correct decision. Under the circumstances of the case the order confirming the sale should also be reversed.

There should be no judgment for costs, in this court, except against Anthony's heirs, viz.: Barbara and Nora Anthony, and Taylor and wife.

Judgment and order of confirmation *reversed* and cause remanded for further proper proceedings.

Riley, Jolly & Walker, for appellants.

Weir & Son, for appellees.

JOHN M. PRICE AND WIFE *v.* TRUSTEES OF TOWN OF BELLEVUE.

[Abstract Kentucky Law Reporter, Vol. 1—276.]

Taxation Under Town Charter.

Where the charter of a town expressly restricts the power to tax to an assessment or levy of forty cents per each one hundred dollars valuation, such restriction will prevent a higher levy; and where there is nothing in the record to show that it has the power to assess additional taxes, as prescribed by an adjoining city this court will not look to the charter of the other city for such powers.

Penalty for Failure to Pay Taxes.

Where no remedy is given by a town charter in the event of a failure to pay taxes to a collector, town trustees have no authority to place any burden on the owners of property beyond the amount authorized by the charter.

APPEAL FROM CAMPBELL CHANCERY COURT.

September 11, 1880.

OPINION BY JUDGE PRYOR:

We cannot see how the taxation imposed under the charter of the town of Bellevue can exceed forty cents per year on the \$100 in value of property owned within the limits of the corporation. The maximum amount for general revenue purposes is forty cents; still, we find from the assessments made that the tax imposed exceeds in some instances one dollar. A special tax of forty cents is authorized to be levied to erect school buildings, etc., but this has not been imposed, or at least no allegation is made in the petition upon which such a recovery could be had, and this is confined to one year only.

The trustees may impose a tax of thirty cents per annum for school purposes, but it does not appear that this has been done; but if such a levy had been made it would not increase the tax on appellants' lots to the amount with which they stand charged. Nor is there any penalty imposed by the provision of the charter on the owner of the property whose name is on the delinquent list, or any remedy for its collection.

If that clause of the charter making the provisions of the Newport charter operates to control the action of the city fathers of Bellevue, they are restricted by the express provisions of their own charter to an assessment or levy of forty cents for revenue purposes, and this court will not look to the charter of an adjoining city to see whether a penalty can be imposed for the non-payment of taxes. None is found in the charter before us, and whether any of the laws of the city of Newport are applicable to Bellevue, and can be enforced, is a question not necessary to be determined in this case. It is certain there is nothing in this record showing that the imposition of a penalty is applicable. Where no remedy is given in the event of a failure to pay to the collector some remedy must be given, and that adopted is the proper one. The judgment is erroneous for the reasons already indicated, as the trustees have exceeded their authority in placing a burden on the owners of property beyond the amount authorized by the charter; and although the taxation of twenty-five cents may have been proper no penalty should have been imposed for its nonpayment.

The judgment in each case is *reversed* and cause remanded for further proceedings.

J. R. Hallam, for appellants. R. M. Webster, for appellees.

[Cited, *Louisville &c. R. Co. v. Commonwealth*, 89 Ky. 531.]

JAMES W. CLARK v. JOSHUA SHORT.

Admission by Pleading.

Where a debtor owes a note and an account to the same person, and in a suit on the note the answer sets up that in addition to the credits entered on the note the defendant had sent money by another with a direction to have it applied on the note, and plaintiff replies, denying that it was to be paid on the note and charging that it was directed to be credited on another debt, no rejoinder being filed, such reply does not amount to an admission by defendant that the money was to be so applied in the payment of the account.

APPEAL FROM MARION COURT OF COMMON PLEAS.

September 11, 1880.

OPINION BY JUDGE HINES:

The answer charges, in substance, that, in addition to the credits entered on the note sued on, appellee sent \$56.25 by the hands of a certain person, with directions to have it credited on the note sued on. To this matter appellant replied, admitting the receipt of the money, denying that it was to be paid on the note sued on, and charging that it was directed to be paid on another debt due to Lisle by appellee. To this there was no rejoinder, and appellant insists that it amounts to an admission by appellee that the money was to be so applied in the payment of the debt to Lisle. We do not think that the pleadings are subject to such a construction. Upon the allegation that this sum of \$56.25 was to be paid on the debt sued on, a direct issue was formed, a determination of which would necessarily dispose of the charge that this sum was paid on the debt of Lisle by direction of appellee. That allegation of the reply is only incidental to the main issue, i. e., was the amount paid on the debt sued on? It is evident from the preparation and progress of the case that the issue as stated above was considered by both parties as fairly presented, and it would appear to be trifling with the rights of the parties to reverse this case upon the ground alone that no rejoinder had been filed, which, if filed, would have made only a collateral and immaterial issue.

We cannot reverse upon the evidence. It is a long and well established rule of this court to treat the finding of a court upon a case like this as the verdict of a properly instructed jury. So treating it, the judgment should not be disturbed unless found to be flagrantly against the weight of evidence. Such is not the case here. The evidence is ample to support the judgment; wherefore it is *affirmed*.

W. B. Harrison, for appellant. J. R. Thomas, for appellee.

EMMA B. COLLINS *v.* WILLIAM H. SLAUGHTER.

[Abstract Kentucky Law Reporter, Vol. 1—261.]

Guardian and Ward.

All moneys or property coming to the hands of a guardian and belonging to his ward must be accounted for by the guardian, and his sureties are liable in the event he makes default.

Appointment of Guardians.

The county court has exclusive jurisdiction in the matter of appointing guardians, and a record showing that the court was in session and a guardian appointed and qualified as such is sufficient even though there may have been no previous order directing or calling the special term at which such appointment is made.

Approval of Guardian's Bond.

Where a guardian's bond is taken and acknowledged in open court, it amounts to such an approval as the law requires; and the fact that the order shows an appointment of and qualification by the guardian as guardian for three infants will not effect his obligation to each of said wards.

Limits of Guardian's Expenditures.

A guardian has no right to maintain and educate his ward at an expense beyond the income of his estate, unless in case of the ward's sickness or extreme infancy so that it cannot be bound out as an apprentice, or no suitable person will take it, or in case it is best for the ward that the principal of his personal estate shall be applied for his board and tuition, and the court, upon settlement, shall deem such application to have been judicious; but neither the ward nor his real estate is liable for such expenditures.

Investment of Ward's Money.

The investment of a ward's money in a foreign corporation, if made, is at the peril of the guardian, and he is properly chargeable with the amount.

APPEAL FROM NELSON CIRCUIT COURT.

September 15, 1880.

OPINION BY JUDGE PRYOR:

The two brothers of the appellant, Mrs. Collins, hold policies of insurance on their lives for \$5,000 each, payable to and for the benefit of their two sisters, the appellant and Louisa. At their death their sisters became entitled to the insurance less the expenses incurred in collecting the money. The appellee, W. H. Slaughter, who was also a brother, seems to have had these policies issued for the benefit of his sisters, who had been left without any estate for their support and education. He was also the statutory guardian of the appellant, Emma, and as such received the money on the policies shortly after the death of his brothers. There is no doubt but that he effected the insurance and paid all the premiums, and we think it equally clear that the purpose in view was to make pro-

vision for the two sisters in the event the brothers, or either of them, should die leaving their sisters surviving.

An inquiry as to the motives prompting the appellee to make this provision for his sisters is immaterial in the present case, as upon the death of the two brothers they became entitled to the money, and that portion of it going to the appellant passed into the hands of the appellee as her statutory guardian. When the appellee was appointed guardian the appellant was about ten years of age, and from this record, it seems, owned no estate, real or personal. It is therefore maintained that the sureties in the guardian's bond are not responsible for the moneys or property subsequently acquired by reason of the gratuitous and benevolent action on the part of her brother. It is hardly necessary to respond to this position further than to say that all moneys or property coming to the hands of the guardian, and belonging to the infant, the guardian must account for, and his sureties are responsible in the event he makes default.

It is also argued that this insurance was effected in the American Life Ins. Co., of Philadelphia, and the money collected by the guardian beyond the limits of this state, and therefore the sureties are not liable. This court, in the case of *McDonald v. Meadows*, 1 Met. 507, where the guardian had received the ward's money inherited from a relation in Tennessee, held that the sureties on the guardian's bond were responsible, and in the case of *Duncan v. Petty*, 3 Dana 223, adjudged the sureties liable where the land had been legally sold in another state and the proceeds paid over to the guardian in this state. There is nothing in the record showing that the guardian had received this money wrongfully, but on the contrary the appellee was in business at the time in the city of Louisville as the agent of this insurance company. The presumption is that the money was paid him in the office of the company in that city, but whether paid in the one place or the other the sureties are liable.

An objection is also urged to the manner in which the appellee was appointed guardian. The appellee qualified at a special term of the Nelson County Court. The authority to hold the special term is not questioned, but it is maintained that it must appear from the record that a special term was called, and that the court in pursuance of that order held the court on the day designated. The record shows that at a call term of the Nelson County Court held,

etc., on Monday, the 1st of October, 1866, the following order was made, viz.: "On motion of Wm. H. Slaughter, it is ordered that he be and is hereby appointed guardian of Andrew, Thomas and Emma Slaughter, whereupon he came into court and took the oath required by law, and together with A. C. Nall and M. Donolo, his sureties, entered into and acknowledged bond," etc.

The county courts of the state have general and exclusive jurisdiction in the matter of appointing guardians, and the record showing that the court was held and the guardian appointed and qualified as such is sufficient, although there may have been no previous order directing or calling the special term. That the necessity existed for holding the term will be presumed, and the transaction not only of business pertaining to the action of such a court, but over which it had general and exclusive jurisdiction, will render such acts as valid as if the orders had been made at a regular term. "Where the jurisdiction is complete and unlimited the action of the court will always be within its authority unless the contrary appears." *Jacob's Adm'r v. Louisville &c. R. Co.*, 10 Bush 263.

The bond was taken and acknowledged in open court, and this was such an approval as the law requires, and the fact that the order shows an appointment of and qualification by the appellee as guardian for all three of the infants does not affect or destroy the obligation.

This being an action for the settlement of the guardian's accounts with his ward, it is complained by the appellant that the chancellor erred in sustaining the commissioner's report, by which the whole of her estate is consumed in the expenditures made during her minority.

It is difficult from the exhibits and vouchers filed to determine the character of the accounts against the ward, or the necessity for such an expenditure of money. While it was better for the ward that she should be educated, even by encroaching on the principal of her estate for that purpose, still, the chancellor cannot sanction such extravagance as resulted in the loss of all she owned. The family had been raised in the county of Nelson upon a farm that was not worth exceeding ten or fifteen thousand dollars, and by economy and industry were able to support the entire family, and their position in society maintained. The removal by the appellee to Louisville affords no reason for such an expenditure of means as to enable his ward to move in the most fashionable circles of that city.

It is argued by counsel that she was permitted to visit the most fashionable, having her necessary apparel made by the most fashionable dressmakers and of the most expensive fabrics, and for that reason the accounts should be allowed.

Her brother, the guardian, was then in a prosperous condition, and from the record in this case had determined to share with his sister a part of his own estate to enable her to move in the most fashionable circles, to gratify his own pride, as well as the desires of his sister. His effort seems to have been to provide her with every comfort and luxury within his power, and while his care and affection for his sister is commendable, no chancellor would have authorized an expenditure that would necessarily swallow up the ward's entire estate, that she might indulge in the pleasures and luxuries of life.

A guardian has no right to maintain and educate his ward at an expense beyond the income of his estate unless, first,—the ward is of such tender years or infirm health that he cannot be bound out as an apprentice or no suitable person will take him; secondly,—when it is best for the ward that the principal of his personal estate shall be applied for his board and tuition, and the court upon a settlement of his accounts shall deem such application to have been judicious and properly made. But neither the ward nor his real estate shall be liable for such disbursement. General Statutes, page 506. The estate belonging to the ward after deducting the premiums paid by the appellant amounted, both sums, to near \$4,759. The interest on this amount at 6 per cent. would be \$285 per annum, and, by adding to this an additional sum so as to increase it to \$400, would constitute a liberal allowance for the maintenance and education of a ward possessed of such a small estate.

The mother died in the year 1867, and up to this time the family lived together and were supported from the same farm, and although the brothers contributed to their support no charge should be made or credit given. From the year 1867 to the year 1873, the time at which the first insurance was paid, the appellee should be credited by \$100 per year, without interest, and from that date until the guardianship ceased, or until the brother ceased to board and educate his ward, he should be allowed a credit of \$400 per annum, and \$50 per annum commission. This is a liberal allowance to the guardian, and but for the peculiar circumstances of the case would not be made. Where such heavy expenditures are contemplated by

a guardian as has been made in this case the chancellor should be first consulted, as cases seldom arise where a court of equity will or ought to sanction the expenditure of the whole estate of the ward.

The investment of the ward's money in the Andes Iron Co., a foreign corporation, was made at the peril of the guardian, and he was properly chargeable with the amount. The object of the insurance would be easily frustrated by an affirmance of the judgment below, and the wards left penniless by reason of the expenditures made by an indulgent brother. Neither the pecuniary misfortunes of the guardian nor the prosperous condition of his ward can be looked to as presenting an equitable defense in the consideration of this case.

Judgment *reversed* and cause remanded for further proceedings consistent with this opinion.

A. B. Montgomery, William Johnson, for appellant.

T. T. Forman, Muir & Wickliffe, for appellee.

JOHN A. DAUGHERTY v. JASPER P. RINGO, ET AL.

[Abstract Kentucky Law Reporter, Vol. 1—272, 282.]

Right to Prosecute an Appeal.

One who has been adjudged a bankrupt has no right to prosecute and appeal, and such an appeal will be dismissed.

APPEAL FROM FLEMING CIRCUIT COURT.

September 15, 1880.

OPINION BY JUDGE COFER:

The appellant, having been adjudged a bankrupt, has no right to prosecute this appeal and it is *dismissed*.

W. H. Cord, for appellant. Andrews & Sudduth, for appellees.

[Cited, *Simpson v. Commonwealth*, 31 Ky. L. 821, 104 S. W. 269.]

COMMONWEALTH v. W. M. McMILLEN.

[Abstract Kentucky Law Reporter, Vol. 1—270.]

Surety on Bail Bond.

A discharge in bankruptcy is not a defense to a suit on a bail bond, for the bankruptcy law does not apply to a debt due the state or to the federal government and congress has not the power, by tax or exemption, to burden the instruments of the state government.

APPEAL FROM LOGAN CIRCUIT COURT.

September 16, 1880.

OPINION BY JUDGE HARGIS:

The appellee, McMillen, was surety on the bail bond of Mort Herndon, executed for his appearance in the Logan Circuit Court to answer the charge of assault and battery. The penalty of the bond is \$300. Herndon made default, the bond was forfeited, and McMillen summoned to answer, which he did, pleading alone his discharge in bankruptcy after the forfeiture. The appellant, commonwealth, demurred to the answer. The demurrer was overruled and the appellee discharged. Of this action of the court the appellant complains.

In the recent case of *Johnson v. Auditor*, 78 Ky. 282, decided by Justice Hines of this court, it is authoritatively settled that "the bankrupt law does not, in terms, apply to any debt due either to the state or to the federal government." The cases of *United States v. Herron*, 20 Wall. 251; *Commonwealth v. Hutchison*, 10 Pa. St. 466; *Saunders v. Commonwealth*, 10 Grat. 494, are cited in that decision, and have been again considered by this court as authority for the position taken.

The congress has neither express nor implied power, by tax or exemption, to burden the instruments of the state government, or free the citizens of the state from the operation of the constitutional means exercised by the state in the execution of its reserved powers. The powers reserved by the states are just as exclusive to them as the powers delegated to the federal government are exclusive to it. Neither government can interfere with such powers of the other; and in the instance before us, the exemption relied upon by appellee, if carried, in its application to all debts or liabilities due the state, to the extreme limits of that position, would draw off and fully destroy the powers of the state to exercise its annual laws or carry into full effect wholesome police regulations. *Ward v. Maryland*, 12 Wall. 418.

The demurrer to appellee's response should have been sustained. Wherefore the judgment is reversed with directions to sustain the demurrer and for other legal proceedings.

Hardin, for appellant. C. S. Grubbs, for appellee.

COMMONWEALTH v. L. P. ANDERSON, ET AL.

[Abstract Kentucky Law Reporter, Vol. 1—275.]

Defense to Suit on Bail Bond.

Discharge in bankruptcy cannot be pleaded as a defense by a surety on a bail bond.

Remission of Forfeiture.

The court in its discretion may remit a forfeiture under a paragraph of answer showing that as soon as the forfeiture on a bail bond was declared the surety proceeded to have the accused arrested and surrendered to the jailer, and praying the court to remit the forfeiture.

APPEAL FROM LOGAN CIRCUIT COURT.

September 16, 1880.

OPINION BY JUDGE HARGIS:

After the forfeiture of the bond of J. W. Anderson, for his appearance to answer the charge of carrying concealed a deadly weapon, his surety, McMillen, pleaded his discharge in bankruptcy in the first paragraph of his answer, and in the second paragraph thereof he alleged that immediately upon the forfeiture he proceeded to have the accused arrested, and that he had procured his arrest and surrender to the jailer of Logan county, wherein the indictment was pending, and prayed the court to exercise its discretion and remit the forfeiture. The appellant, the commonwealth, demurred to the response, which was overruled and the proceeding dismissed.

The first paragraph presented no defense, as this court decided in the case heard jointly with this. But the second paragraph of the answer contained enough to authorize the court to hear testimony and remit the forfeiture.

No reply being filed to the response after demurrer, which was properly overruled, the allegations were confessed; and nothing else appearing the judgment of dismissal was proper, as it must be presumed that the court remitted the forfeiture or did that which he could legally do rather than what he could not legally do.

Wherefore the judgment is *affirmed*.

Harding, for appellant. C. S. Grubbs, for appellees.

JOHN DURAND v. JAMES A. CUNNINGHAM.

[Abstract Kentucky Law Reporter, Vol. 1—277.
Later reported in abstract, 4 Ky. L. 614.]

Suits Between Partners.

One partner cannot sue another in a court at law for a partnership liability until there has been a settlement of the partnership and the indebtedness has been ascertained; and since such an account must be taken in a court of equity, that tribunal has power to give ample relief as between such partners.

APPEAL FROM LOUISVILLE CHANCERY COURT.

September 17, 1880.

OPINION BY JUDGE PRYOR:

There is no principle better settled than that one partner cannot sue another at law for a partnership liability until there has been a settlement of the partnership and the indebtedness ascertained, and that such an account must be taken in a court of equity. That tribunal can give ample relief,—as said by Story in his work on Partnership (7th ed.), Sec. 221, "It is impossible to know whether a particular partner be a debtor or creditor of the firm, for, although he may have advanced large sums of money on account thereof, he may be indebted to the firm in a much larger amount."

This is the recognized doctrine on the subject, and while the facts of this record leave but little room to doubt an indebtedness by Metesser to Cunningham, the chancellor is unable to say as to the extent of the indebtedness, for the reason that no settlement has been made of the accounts. The notes having been placed in the hands of Jas. A. Cunningham, as assignee, with the power to collect all the claims due the firm and first pay over to J. H. Cunningham the amount due him by Metesser, before anything was paid to the latter, would authorize an action for the recovery of the money; but this remedy is by an equitable action to see what that indebtedness is. The appellant, Durand, claims to own the property, and as between him and Metesser his right to it is unquestioned. Being a party to the action and the boat subjected to the payment of Metesser's debt, the error assigned "that no judgment should have been rendered against Metesser" is a sufficient assignment, and will authorize a reversal if the law of the case demands it.

Metesser is not an appellant, and the judgment against him is

not sought to be reversed; but the appellant, Durand, who claims to be the vendee of the property attached and sold, says that it ought not to have been subjected until it was ascertained in a proper and legal mode that his vendor owed the debt. If the debt is not owing it will be and is the property of appellant, and whether the indebtedness exists to the amount of the note can only be known when the partnership is settled.

We concur with the chancellor below that some relief must be given upon the facts of this record, and while we see nothing in the proof that will authorize the appellant to hold this boat, or any part of it or any interest in it, as against the claim of the appellee, if established, as against the appellant, there must first be a settlement of the partnership accounts in order to ascertain the extent of the liability. This case is in a court of equity, and, the facts demanding the interposition of the chancellor under the prayer for general relief, the pleadings should be allowed to be amended that the case should go to the commissioner for a settlement of the accounts of the partnership, or if a settlement has been had the same should be filed, showing the balance due in an amended pleading; or if an action is pending for a settlement the chancellor may suspend the proceedings until the settlement is had, and when balance due is made to appear the relief to which the appellee is entitled can be given. Inasmuch as amended pleadings may be filed the appellant should be allowed, by additional testimony, if he can, to explain the character of the transactions between himself and Metesser.

Judgment, so far as it affects the rights of the appellant, is *reversed*, but the attachment will remain undischarged until the question of indebtedness, if any, can be determined.

Russell & Helm, for appellant.

W. O. & J. L. Dodd, for appellee.

ADAMS EXPRESS CO. *v.* E. L. HINES, ASSIGNEE.

[Abstract Kentucky Law Reporter, Vol. 1—266.]

Change of Venue.

A notice for a change of venue should be held for naught when made in a case not pending in that court; and where a case is tried several times after a motion for a change of venue was made, and there is no application or further objection to the venue in which the trial was had, no question can then be made as to the correctness of the court's ruling.

Interrogatories to the Jury.

It is not error for the trial court to refuse to send the jury back after it had returned with its verdict, in order that other findings might be made upon interrogatories then offered for the first time.

APPEAL FROM WARREN COURT OF COMMON PLEAS.

September 18, 1880.

OPINION BY JUDGE PRYOR:

While the evidence in this case was conflicting, and perhaps the weight of the testimony for the appellant, yet it must be remembered that there were five mis-trials in the case, and two verdicts for the appellee. Seven juries have been sworn to try the issue between these parties, with a finding twice for the plaintiffs, and it must be a glaring error indeed that would require this court to disturb the judgment. The maxim "*Interest reipublicæ ut sit finis litium*" should be applied in this case, and if not, it would be difficult to tell when this litigation would have an ending. By the amended answer of the appellant it is distinctly alleged that the sum in controversy was paid to T. L. Stevens, and there is no pretense that it was paid to any one else.

The question in the case upon the facts was,—Had Stevens authority from Kinnaird & Stevens to receive the money? This interrogatory was propounded to the jury, and the response was in the negative, and decisive of the question involved. The court might have enlightened the jury by telling them what acts constituted the authority necessary to enable Stevens to recover the money, but we think an enlightened jury would and did understand that if Jones and Stevens were the general agents of Stevens and Kinnaird, in receiving and disbursing their money, no special authority was necessary to enable either to receive this particular fund. Nor are we prepared to say that such general authority has been shown in this case. The amended answer was properly refused.

The company knew full well what receipts it gave evidencing the terms upon which the liability was made to depend, and it was too late after repeated trials to permit it to raise such an issue, and to say that where the company, or its agents, had received the money for the appellee, and the latter had failed to notify the company that it had not been received within thirty days after the date of

the receipt, such a state of fact would relieve the company from responsibility is a doctrine that this court would scarcely accede to. Kinnaird and Stevens did not know of the loss, or that the money had been sent them, until long after the thirty days from the date of the receipt; and besides, this amended answer was offered to be filed after there had been two trials and two continuances of the cause.

The notice to D. B. Stevens that a motion would be made for a change of venue in a case pending between himself and the Adams Express Co. was quashed on the ground that no such action was pending in that court. The court below had adjudged that no notice had been given, and the application for a change of venue was, as the case was regarded by the court below, made in a case not pending in that court. Whether the notice was or was not sufficient, the case was tried several times after this motion for a change of venue was made, and still there was no application or any further objection to the venue in which the hearing was had. If the notice was to change the venue in a case not before the court the whole proceeding was a nullity, and the appellant should not be permitted to stand by its exceptions and then speculate upon the chances of a verdict in a subsequent trial.

The court did not err in refusing to send the jury back after they had returned with their verdict, that other findings might be made upon interrogatories then offered for the first time. The questions should have been propounded before the jury returned into court with their verdict. The jury should be required to find a special verdict when the evidence is concluded and before the argument to the jury, according the language of the code. What effect a direction to find specially after the argument would have is not necessary to be determined.

We see no reason for disturbing the judgment below and the same is *affirmed*.

Judge Hines not sitting.

John M. Porter, R. Rodes, for appellant.

Halsell & Mitchell, for appellee.

MARION COUNTY *v.* B. E. EVERITT.

[Abstract Kentucky Law Reporter, Vol. 1—267, as *Marion County v. Averitt.*]

Rule for Construing a Statute.

To ascertain the meaning of a statute, the court will look to the cause of its enactment, and if the facts bring the case within the object and spirit of the law, it should be made to apply.

Recovery Against County for Services.

Under a statute providing for the removal and isolation of small-pox patients on the order of a justice of the peace, and, if such patient is unable to bear the expense of such removal, providing that it shall be borne by the county, where a patient is already in an isolated place, and a justice ordered the services of a physician, who attended such patient and furnished maintenance and medicine, and the patient is unable to pay, the county is liable for such services.

APPEAL FROM MARION CIRCUIT COURT.

September 21, 1880.

OPINION BY JUDGE PRYOR:

In ascertaining the true meaning of a statute we must look to the cause of its enactment by the law-making power, and if the facts bring the case within the object and spirit of the law it should be made to apply. If the surgeon opens the vein of one in the street to relieve him of disease, and is prescribed under the statute mentioned by Puffendorf, which provides "that whoever drew blood in the street should be punished with the utmost severity", then the statute under which this allowance was made has been wrongfully construed by the court below.

The second section of Art. 3, Gen. Stat., page 792, provides that "if any person who has never had the smallpox goes into a house where the disease is, or associates with a person that is afflicted therewith, any justice of the peace, on due proof of the fact, may cause such person to be conveyed to some house or place in the county where the disease will not spread, there to remain until he shall have gone through the disease, or until a physician shall certify that he will not take the same. If such person be not able to pay the expense of his removal, the county shall pay the same."

In this case it appears that a child ten or eleven months old was taken sick in a house adjoining or near the town of Lebanon, and the appellant pronounced the disease smallpox. There were several

others living in the house at the time, and two or more of them contracted the disease and died. A justice of the peace was informed of the condition of the family and ordered the services rendered. There was no direction to convey the parties to any other house, as the disease was less liable to spread by requiring them to remain where they were then living; and this appellant, by the direction of the justice and as a matter of humanity, visited these smallpox patients for the period of forty days, administering to their wants when living and attending to their burial when dead. He was a practicing physician in the city of Lebanon, and by reason of his attention to these smallpox patients he was not only deprived of this practice for the time being, but avoided by those who knew of his attention to those having this loathsome disease.

It is maintained that the justice had no power to employ any one except in the character of nurse, and that as no one but the county judge or the county court when in session, could authorize medical attention to the poor of the county, the claim of the appellee should be denied. His visits were constant to these unfortunate people; he had their food and fuel furnished them, administered medicines when present, and gave directions for their treatment by those who nursed them, and aided after night in the interment of such as died. We think these services clearly embraced by the statute, although performed by a regular practicing physician and in his capacity as such. Besides, the county court, upon the presentation of his claim, allowed him the sum of four hundred dollars, thereby recognizing the validity of his claim for the services rendered and the employment by the justice. The only issue to be tried on this appeal was as to the value of the services rendered. All the facts necessary to a recovery are conceded, or if not the facts stand uncontradicted upon the record, and a jury of the county apportioning, as they should have done, the value of his services, have given him a fair compensation and the verdict must be sustained.

It was not necessary, in making an application to the county court for an allowance, to present the claim in the form of an action for services rendered. The presentation of the account and proof of the services is all that can be required. There is enough in the record to show that the parties for whom the services were rendered were unable to pay the expenses incurred.

The judgment below is *affirmed*.

R. C. Palmer, for appellant. Russell & Arritt, for appellee.

ALFRED CHAPMAN, ET AL., v. J. M. BIGGER.

Purchaser at Judicial Sale.

A purchaser at a judicial sale of real estate not colluding with the plaintiff, and not a party to any fraud, and not having notice of any, is not affected by the fraud of others in bringing about the sale.

Notice of Fraud in Judicial Sale.

Where land sold at a judicial sale is in the adverse possession of others, and although worth about eight dollars per acre is sold for less than one dollar per acre and the purchaser aided in procuring the judgment upon which the sale took place, such a sale will be set aside as against the purchaser and the plaintiff; but the chancellor should adjudge a lien on the land in favor of the purchaser for the purchase money and amount of costs and expenses incurred in defending his title.

APPEAL FROM McCracken Court of Common Pleas.

September 21, 1880.

OPINION BY JUDGE PRYOR:

The question of jurisdiction cannot affect the rights of the parties, as appellants have sought the aid of the same court in relieving them as against the purchaser from a sale resulting, as the proof conduces to show, in a sacrifice of their estate. The executors, who were non-residents, as well as the non-resident heirs, had been proceeded against by constructive service. The claim of O. Barnum's representatives was established and the land sold for the payment of the debt. One of the heirs or devisees was living in this state at the time this judgment was rendered, and there were other irregularities contained in the proceedings that made the case full of error. This, however, did not affect the rights of the purchaser, unless it can be made to appear that he was so far connected with the proceeding as to make him in effect a party to it. We concur in the conclusion arrived at by the court below that there is no evidence of fraud on the part of either the purchaser or the plaintiffs in the original action; and, so far as the purchaser is concerned, he seemed to have acted in the best of faith. Still, it appears that he was representing the attorneys for the plaintiffs at the time the judgment was rendered, and having purchased the land the sale should have been set aside.

The land at the time the sale was made was in the adverse possession of others, and although of the value of eight or ten dollars

an acre was sold for less than one dollar. This was attributed, no doubt, to the adverse holding by strangers, and is of itself sufficient to authorize the chancellor to interfere as against the original plaintiffs. As the purchaser aided in procuring the judgment, although in good faith, the irregularities in the proceedings must also affect him. It was proper, however, for the court, as against the heirs who had asked that the purchaser be divested of title, to place the purchaser in the condition he was before the sale.

He was entitled to a lien on the land for his purchase money and interest, and also an allowance for his costs and expenses connected with the defense of the action to set aside the sale. The chancellor had the right to place the appellants on terms. In the case of *Forman v. Hunt*, 3 Dana 614, the conduct of the purchaser being unexceptionable, he was entitled to his costs and expenses incurred in making the purchase and in resisting the motion to set the sale aside, to be assessed upon the liberal principles allowed between lawyer and client. *Stump v. Martin*, 9 Bush 285.

The court below acted properly in setting aside the sale and in giving to the appellee a lien for the money paid by him under his purchase, and his costs and expenses. Whether an attorney's fee ought to be allowed should depend upon the circumstances affecting its justice and equity in each case.

Judgment *affirmed* on original and cross-appeal.

P. D. Geiser, for appellants. J. M. Bigger, for appellee.

H. G. SPRADLING v. J. W. HAZELRIGG'S ADM'R.

[Kentucky Law Reporter, Vol. 1—236, as *Spradlin v. Hazlerigg's Adm'r.*]

Usurious Interest.

A note providing for 10 per cent. interest, given before the conventional rate of interest law was enacted, is not usurious.

Interest After Maturity of Note.

A note bearing 10 per cent. interest, not providing that it shall draw such interest from date until paid, only draws the legal rate of interest from the date of its maturity, and it is error to compute 10 per cent. interest thereon after judgment.

APPEAL FROM MORGAN CIRCUIT COURT.

September 22, 1880.

OPINION BY JUDGE HARGIS:

The appellant bought the land described in the pleadings of appellee's testator, and accepted from him a quit-claim deed for it. By this deed he was invested with the title owned by the grantor, under a covenant to defend that title only against the claims of the grantor, or those claiming or who might claim by, through or under him.

There was no breach of the special warranty contained in the deed alleged in the answer. The allegation thereof on that point set forth the fact that the appellant had lost a portion of the land in a lawsuit with a stranger, who had recovered it upon a superior title to that of his grantor, and not upon any title or claim derived from the grantor.

The answer does not allege or intimate any fraud upon the part of the testator connected with the supposed alteration of the patent; and in so far as the appellant sought relief for breach of the covenant contained in the deed, his answer presented no defense to appellee's action.

There is a valuable consideration to sustain the obligation of appellant; and the extent of that consideration is not material here, because the appellant's own contract did not provide him with any remedy against the contingency which has happened, but expressly exempted his grantor from any responsibility therefor.

The ten per cent. interest named in the notes given before the conventional rate of interest law was enacted, is not usurious, because the deed to appellant specifies that the ten per cent. interest embraced in those notes constituted a part of the consideration for the land. As that deed is made part of plaintiff's petition, the fact sufficiently appears from it and the notes, without further allegations, that the ten per cent. interest was not for the loan or forbearance of money, but for land. Interest thereon at ten per cent. should have been allowed on each of the notes until it fell due; and thereafter at six per cent., as indulgence after the notes became due was a forbearance to enforce the right to collect money.

The judgment might have been legally rendered for the principal and accrued interest computed as herein indicated. But the court below erred in computing interest at ten per cent. from the date of the judgment. And it is, therefore, *reversed*, and the case remanded for further proper proceedings.

Cooper & Havens, J. & J. W. Rodman, for appellant.

WILLIAM P. BENNETT, ET AL., v. JAMES BRYAN.

[Abstract Kentucky Law Reporter, Vol. 1—274.]

Appeals from County Court to Circuit Court.

There being no provision of the civil code regulating the manner of appeals from the county courts in highway cases, such appeals must be prosecuted under the common law, and tried as appeals and not *de novo*.

APPEAL FROM GREENUP CIRCUIT COURT.

September 22, 1880.

OPINION BY JUDGE HARGIS:

The circuit court erred in dismissing the appellant's appeal from the judgment of the county court because it was not taken within sixty days from the rendering of the judgment, as provided in Sec. 729, Chap. 2, Title 16, Civil Code. That chapter does not confer appellate jurisdiction upon the circuit courts in cases arising in the county courts on applications to open public roads. Sec. 43, Art. 1, Chap. 94, Gen. Stat., declares that in all such cases the party aggrieved may prosecute an appeal within one year to the circuit court of the county, which court shall have jurisdiction without a jury to try the law and facts of the case. And this statute confers the jurisdiction on circuit courts, and not the chapter of the civil code before mentioned.

There being no provision of the civil code, the statute regulating the manner of appeals in this class of cases from the county courts, such appeals must be prosecuted under the common law and tried as appeals, and not *de novo*. *Helm v. Short*, 7 Bush 623. The appeal from the county court substantially complies with the common law, and should have been heard.

The order of the county court appointing viewers sufficiently states the object of the application to comply with the clause of Sec. 1, Art. 1, Chap. 94, Gen. Stat., authorizing the opening of roads "for the convenience of traveling to any navigable river". The order, after reciting the beginning and the terminus of the contemplated road, so as to intersect the Ohio River road, goes on and says it is for the purpose of getting through the nearest and best way from the Globe Schoolhouse and voting place to the Ohio river. The order does not leave the terminus of the contemplated road to be found by the general description of "to the Ohio River

road", which might be located a long distance from the river at that point, but specially sets forth that the purpose of the new road is to get to the Ohio river, which is a navigable stream within the judicial knowledge of the court.

Judgment *reversed* and cause remanded for further proper proceedings.

B. F. Bennett, for appellants.

Geo. E. Roe, E. F. Dulin, for appellee.

D. P. CUBBERLY, ET AL., *v.* VAN F. LYONS.

[Abstract Kentucky Law Reporter, Vol. 1—275.]

Vendor's Lien.

Where a vendor in his conveyance reserves a lien for purchase money, and the deed is recorded, others acquiring such property are bound to take notice of such lien.

Effect of a Judgment.

While the judgment of a court of competent jurisdiction is conclusive between the parties as to matters that were or might have been litigated in the suit, still, where no issue was tendered nor could have been tendered a party is not bound by the judgment.

Sufficiency of Petition.

Where a plaintiff, having knowledge and notice of the character of another's lien, does not even aver that he is ignorant of the extent and nature of a defendant's lien, or that he has no lien or claim, such petition imposes no duty on the defendant to set up his lien, and a judgment on such a petition will not prevent such defendant lienholder from asserting his lien in another action.

APPEAL FROM LOUISVILLE CHANCERY COURT.

September 22, 1880.

OPINION BY JUDGE HINES:

Appellants, having judgment against George Calhoun for a small sum, had execution levied upon a certain tract of land, which was sold subject to encumbrances and purchased by appellants for their debt. Subsequently, appellants brought suit in equity against Lyons and others, seeking a sale of the land to satisfy their lien acquired by purchase under execution. In this petition it is alleged that "Lyons has some interest in or lien upon the aforesaid property",

and asks that Lyons be compelled to disclose what interest he has, or be forever barred from asserting any claim. To this petition Lyons made no response, and the land was sold under decree, which made no reference to any lien by Lyons. Lyons had sold the land to Calhoun and retained a lien in the deed for the purchase money. This suit was brought by Lyons to enforce his lien, and the question is whether Lyons is barred by reason of his failure to assert claim in the equity suit by appellants. It is to be observed that Lyons' lien was of record, that appellants had notice of it, and allege in their petition the existence of a lien in favor of Lyons.

It is not doubted that, as a general rule, the judgment of a court of competent jurisdiction is conclusive between the parties as to all matters that were or might have been litigated in that suit, but the rule does not reach a case like this. Here no issue was tendered nor could one have been tendered. Appellants allege the existence of a lien in favor of Lyons, and do not even charge that they are ignorant of the extent of that lien. They do not claim that the lien does not in fact exist, or that it is not to the extent shown by the deed from Lyons to Calhoun, which is of record. Such a petition imposed no duty upon Lyons. If appellants were ignorant of the extent of Lyons' lien it was their duty to so allege, and not having done so they will not be permitted to defeat Lyons' lien, after having lulled him into the belief that they were claiming nothing adverse to his interest. The court did not undertake to prejudice the rights of the other lienholders by its decree in favor of appellants in their suit to enforce their lien, and in fact had no right to do so. Sec. 694, Civil Code,

Judgment affirmed.

W. B. Fleming, for appellants. Russell & Helm, for appellee.

THOMAS H. BROWN v. THOMAS J. LEWIS.

[Kentucky Law Reporter, Vol. 1—238.]

Trespass.

One who counsels and advises a trespass is liable as a trespasser, and may be sued alone or jointly with others who advised such trespass.

Liability of Trespassers.

Persons in possession of house as trespassers, and those persons who counsel and advise the trespass, are liable for whatever injury results to the house from their occupation and use of it.

APPEAL FROM BRECKENRIDGE CIRCUIT COURT.

September 23, 1880.

OPINION OF JUDGE COFER:

That the appellee notified Miss Owen that she could teach in the house is proved by his own testimony given in the case, and that he intended and expected her to occupy it as a schoolhouse is shown by his conduct throughout. He says that he told Hinton that he would employ a teacher, if he could get a house; that Hinton told him that they could get the house, meaning, as the context clearly shows, the house that was burned; that he sent word to Miss Owen, whom he had employed, that she could teach in the house. He also says he hauled a load of benches, and left them outside of the house, for the school; and he says that he told Miss Owen that he would see DeHaven and if the house could be had he would let her know and she could teach the school there. He did see DeHaven, and was told that the house could be had, and it was no doubt on the faith of that interview that he sent word to the teacher, and hauled the benches to the house. That he counseled and advised the teacher to occupy the house does not admit of doubt, and that one who counsels and advises a trespass is liable as a trespasser is equally clear. He no doubt supposed that DeHaven had some sort of control over the house; otherwise there was no reason for consulting him. But that the house belonged to the appellant, and DeHaven had no right to authorize its use as a schoolhouse, is clearly shown.

The entry of the teacher and the children into the house, and its occupation by them, was a trespass; and the appellant, having advised and counseled the entry and use of the house, was a cotrespasser, and might be sued alone or jointly with others who counseled or advised the trespass. Nor can the appellee's good faith protect him against the legal right of the appellant to compensation for the injury sustained on account of the trespass. The consent of DeHaven to the use of his house, and his failure to disclose his want of authority to bind the appellant by such consent, cannot avail the appellee, even if he had been ignorant of the fact that the house belonged to the appellant; but his own evidence shows that he was not ignorant of the fact. That DeHaven had corn in the house gave him no such control of it as authorized him to allow it to be used as a schoolhouse.

Nor is it material whether the burning of the house was caused by the negligence of those occupying it, or by a defective flue without any negligence on their part. They were there as trespassers, and they and those who counseled or advised the trespass are responsible for whatever injury resulted to the house from their occupation and use of it. That DeHaven gave his consent to the use of the house, and took part in putting it in readiness for the school, may show that he is also liable; but as he had no authority from the appellant such consent cannot affect his rights.

Wherefore the judgment is *reversed* and the cause remanded for a new trial upon principles not inconsistent with this opinion.

Eskridge, for appellant. Owen & Ellis, for appellee.

JANE D. NICHOLS v. SIMON SCARCE, ET AL.

[Abstract Kentucky Law Reporter, Vol. 1—270.]

Husband and Wife—Husband's Creditors.

Where the husband receives money from his wife and executes to her his notes, promising to repay her, such obligations cannot be enforced by the wife as against the husband's creditors.

APPEAL FROM WOODFORD COURT OF COMMON PLEAS.

September 23, 1880.

OPINION BY JUDGE PRYOR:

The promise on the part of the husband was never carried out. He gets the money, and promises to pay her the proceeds at some future day by the execution of his notes, that, if binding on the husband as between the wife and his personal representatives, cannot and ought not to affect the claims of creditors. That the wife can loan the husband her money by taking his notes, and then enforce the claim as against creditors, is a doctrine that will not be sanctioned by this court. It will invite the execution of such agreements at the expense of creditors; and while the promise to pay in this particular case was made in good faith, it cannot, in a court of equity prevail against the husband's creditors. The husband had received the checks for the money, and although he may not have intended to convert it to his own use, that fact should have been evidenced in some other way than the execution of his note to his wife.

The cases of *Darnaby v. Darnaby*, 14 Bush 485, and *Pryor v. Smith*, 4 Bush 379, presented as much as or more equity in favor of the wife than the case before us. In the case of *Darnaby v. Darnaby* the husband received the wife's money upon an express agreement to invest it for her in real estate and have the deed made to her separate use. The right of the wife was denied, and one of the grounds was that it would open a door to innumerable frauds and perjuries. Although the contract in that case was verbal, when proven, as between the husband and wife, it would have been enforced. In the case of *Pryor v. Smith* the equity of the wife was equally as strong, and still denied as against creditors. If there had been a verbal promise in this case by the husband to pay this money to the wife, and that he should hold it as her separate estate, it would have been as binding on the husband as if in writing; but it cannot be urged as against creditors that it should be enforced.

As said by the court in *Maraman's Adm'r v. Maraman*, 4 Met. 84, the legal and equitable demands of creditors must prevail. The evidence of a settlement on the wife must depend upon other proof than the mere promise by the husband, whether verbal or written, that he will pay her the money received, in order to affect the rights of creditors which the chancellor may be reluctant to pronounce against the wife in a case like this, where it must be inferred that the intentions of both husband and wife were free from any fraud as against his creditors; still, the rule of equity applicable to this class of cases ought not to be changed to avoid the hardships of this particular case.

Judgment affirmed.

H. C. McLeod, A. Duvall, for appellant.

Porter and Wallace, for appellees.

W. L. ROBERTS v. THOMAS GREEN, ET AL.

[Abstract Kentucky Law Reporter, Vol. 1—279.]

Recovery of Money Paid in Ignorance of One's Rights.

When it is sought to recover money wrongfully paid on account of an assessment for a public improvement, in ignorance of plaintiff's rights, to make the petition good the plaintiff must negative the idea that he received any consideration for the money paid; and he cannot recover where it is shown that he has received a consideration and is enjoying the benefits derived from the improvement adjoining his real estate.

APPEAL FROM KENTON CIRCUIT COURT.

September 23, 1880.

OPINION BY JUDGE PRYOR:

Waiving the consideration of any other question that might be raised in this case, it is evident that the failure on the part of the appellant to allege that he had received no consideration or benefit, other than the usual advantages arising from such improvements in the city, will defeat his right of recovery. The improvement or pavement was made in front of appellant's property, and the direct benefit therefrom may have constituted a sufficient consideration for the payment of the money. This action is to recover back money wrongfully paid and in ignorance of appellant's rights, and it is certainly requisite that the plaintiff in such a case must negative the idea that he received any consideration for the money paid, if he has received a consideration and is enjoying the benefits derived from the improvement bordering on his property he cannot recover. *City of Louisville v. Zanone*, 1 Met. 151.

Judgment affirmed.

Stevenson & O'Hara, for appellant. *R. D. Handy*, for appellees.

W. A. HICKMAN v. F. M. OWENS, ADMINISTRATOR, ET AL.

[Abstract Kentucky Law Reporter, Vol. 1—263.]

Rescission of Contract to Purchase Land.

Where a purchaser of land pays a part of the purchase money, goes into and retains the possession for nearly twenty years, paying interest on the deferred payments, dies, not leaving personalty sufficient to pay his debts, and the evidence indicates that the purchaser at the time of his death had not agreed to a rescission of the contract, the chancellor, under such circumstances, should not adjudge a rescission at the demand of the vendor, on the theory that the vendee was a mere tenant and not a purchaser.

APPEAL FROM DAVIESS CIRCUIT COURT.

September 24, 1880.

OPINION BY JUDGE PRYOR:

It is alleged in the petition that the purchase and possession by F. M. Owens was made in the year 1855, and his notes then executed for the purchase money. He continued in possession until

his death in the year 1874, and his family remained in possession until the death of his wife a short time after. The purchase was made by parol and some of the purchase money paid. The vendee made lasting and valuable improvements on the premises, equal in value to the land itself, and paid interest, as the proof conduces to show, on the purchase money from time to time. At his death the personal estate was insufficient to discharge his liabilities, and it is now attempted to be shown on the part of the appellee, by several witnesses who seem to have had conversations with the deceased shortly before his death, that he and his brother had rescinded the contract; while on the other hand the statements of the deceased when on his deathbed indicate clearly that he regarded himself as the owner.

He offered to purchase of one of his neighbors a small strip of land that he might add it to his possessions, and made other statements entirely inconsistent with the idea that any rescission had taken place. His possession was long enough to have ripened into a perfect title, and the chancellor, under the circumstances, ought not to have rescinded the contract. His creditors had a claim upon this estate, and the surrender back, if really made, would not defeat their rights. With such conflicting testimony as to the attempted rescission, the vendor should be satisfied if given his purchase money with its interest, and when he obtains that, he has all to which, in equity or good conscience, he is entitled. A chancellor ought not to deprive a man of his possession and right upon such uncertain testimony. The want of a written memorial did not make the sale void, and possession for a term of fifteen years under a claim of right would authorize the chancellor to presume that the contract was in writing. An entry under a parol purchase is a disseizin, and possession may ripen into a title. *Moore v. Webb*, 2 B. Mon. 282.

The vendor will not be allowed to say, after such a lapse of time, that the sale was conditional and the vendee was a mere tenant and not a purchaser. It is manifest, however, that a part of the purchase money is unpaid, and the liability of the land therefor is unquestioned. The deceased time and again acknowledged that indebtedness, and when his heirs or his creditors come into a court of equity asking for equity the chancellor will require them to do equity.

This judgment is *reversed* and cause remanded with directions

to sell the land and apply the proceeds first to the payment of the purchase money, and distribute the balance according to the rights of the parties.

Riley, Jolly & Walker, for appellant.

Owen & Ellis, for appellees.

[Cited, *Medlock v. Suter*, 80 Ky. 101, 3 Ky. L. 587.]

E. R. MERCER v. E. N. WARFIELD'S G'D'N.

[Abstract Kentucky Law Reporter, Vol. 1—273.]

Suit to Set Aside Conveyance.

For evidence held to be insufficient to set aside a conveyance claimed to have been made fraudulently, see opinion below.

Rights of Creditor to Set Aside a Conveyance.

A creditor who holds the only claim against the vendor of real estate, and where it is shown that the debtor has other property sufficient to discharge such debt, cannot successfully attack a conveyance made by his debtor.

APPEAL FROM HARDIN CIRCUIT COURT.

September 28, 1880.

OPINION BY JUDGE HINES:

There is no brief for appellee in this case, but from a careful examination of the record it appears that appellee seeks to set aside on the grounds of fraud and no consideration a conveyance from N. J. Duncan to appellant. The conveyance was made and recorded in March, 1871, and this suit to set it aside was instituted in April, 1872. The petition insists, as an evidence of fraud, that the land which the deed recites was sold for \$3,500 was worth at the time \$6,000. Upon this point the evidence fixes the value at from \$3,000 to \$3,700. The evidence discloses the fact that appellant was amply able to pay for the land, and that he, at the time of the conveyance, had advanced for and paid to Duncan the larger part of the \$3,500, and that when this suit was brought the whole of the consideration had been paid.

It is also shown that the debt for which the attempt to subject the land is made is the only debt owing by Duncan, and that he has other property sufficient to satisfy the claim. The only facts appearing to raise even a suspicion of fraud are that the deed ex-

presses that the whole of the consideration had been paid, and further, that appellant paid two small debts, amounting to about \$1,000, to have dismissed a proceeding in bankruptcy against Duncan charging that the conveyance to appellant was an act of bankruptcy, after appellant had stated that he had paid Duncan in full. The form of the deed is usual, when no lien is retained, and no importance should be attached to it. Nor do we think that any conclusion unfavorable to appellant should be drawn from the payment of the debts to quiet the proceedings in bankruptcy. He had the undoubted right to buy his peace in that way. Whatever the circumstances might amount to, if connected with other evidence of fraud or no consideration, standing alone as it does it amounts to nothing.

Judgment *reversed* and cause remanded for further proceedings.
Montgomery & Poston, for appellant. W. F. Bell, for appellee.

MASONIC SAVINGS BANK *v.* RONALD'S EX'R.

[Abstract Kentucky Law Reporter, Vol. 1—273.]

Executor Cannot Attack Validity of Mortgage Procured to Secure Him as Individual.

Where a partnership is a creditor of another firm, and a member of such creditor firm is also executor of an estate which is also a creditor of said other firm, and said member induces said debtor firm to execute a mortgage to secure the debt due his firm, he cannot afterward, as executor, be allowed to attack the validity of such mortgage.

APPEAL FROM WARREN CIRCUIT COURT.

September 29, 1880.

OPINION OF JUDGE COFER:

At the time W. A. Ronald procured E. M. Adair & Co. to execute the mortgage to Webb, Ronald & Co., of which firm he was a member, he was also the executor of S. F. J. Ronald, and as such held debts against two of the members of the firm of E. M. Adair & Co. The only question necessary to be considered on this appeal is whether he, as executor, could attack the validity of the mortgage which he, as a member of the firm of Webb, Ronald & Co., has procured to be executed. The note and mortgage were assigned by Webb, Ronald & Co. to the appellant, and if Ronald can attack

the mortgage successfully he will thus defeat a security to which he has given currency in one capacity for the benefit of himself in another capacity, and that, too, in a court of equity. No such result can, in our opinion, be worked out on the idea that W. A. Ronald, executor, is a different person from W. A. Ronald as an individual, or as a member of the firm of Webb, Ronald & Co.

A court of equity might seize upon such a distinction to prevent an obvious injustice, but never in order to work out an injustice. It seems impossible to say that the mind of W. A. Ronald, as an individual, not only assented to, but sought the mortgage, but that the mind of W. A. Ronald, executor, did not; and he is as much bound as he would have been if the mortgage had been made to a stranger with his acceptance and express assent, in which case we presume it would hardly be claimed that he could afterward be heard to attach the mortgage in the hands of an innocent third party, and whatever binds him binds his successor in office.

We are, therefore, of the opinion that the court erred in adjudging the mortgage to be within the statute, and the judgment is *reversed* and the cause remanded with directions to dismiss the petition.

Judge Hines not sitting.

Bush & Porter, for appellant.

Wright & McElroy, for appellee.

W. C. ROWAN, ET AL., v. JOHN W. RUSSELL.

[Abstract Kentucky Law Reporter, Vol. 1—278.]

Liability of Heirs for Ancestor's Contracts.

An heir is not liable on his ancestor's contract beyond the extent of assets received by him from the ancestor's estate.

APPEAL FROM OHIO CIRCUIT COURT.

September 29, 1880.

OPINION BY JUDGE HINES:

There is nothing in this case to take it out of the general rule that the heir is not responsible on the contract of his ancestor, except to the extent of assets received; and as there is nothing to show that appellants received anything except the land in controversy it was error to render personal judgment against them for the value

of the improvements, and to adjudge that appellee should remain in possession of the property until the judgment and costs are paid.

It is immaterial whether the amount of appellee's recovery for improvements is measured by the cost of the improvements or by the amount they enhanced the value of the property, since the weight of the evidence is to the effect that the property has been enhanced in value to the extent of the cost of the improvements.

Wherefore, so much of the judgment as is personal against appellants, and as authorizes appellee to retain possession until that judgment is satisfied, is *reversed* and cause remanded with directions for proceedings consistent with this opinion.

McHenry & Hill, for appellants.

ROBERT A. GARRISON *v.* SAMUEL Y. GARRISON.

[Abstract Kentucky Law Reporter, Vol. 1—279.]

Answer Filed too Late.

Facts known to a defendant should be pleaded in his answer, and an amended answer will not be allowed to be filed which pleads facts known to the defendant at the time of filing his original answer where no excuse is given for failure to set them up then.

APPEAL FROM WARREN CIRCUIT COURT.

September 29, 1880.

OPINION OF JUDGE COFER:

The amended answer and cross-petition of the appellee seems to have conformed in every particular to the opinion of this court rendered on the former appeal, and the court did not err in permitting it to be filed.

The amended answer tendered by the appellant was inconsistent with his original answer, in so far as it related to the 42 acres of land. In the original answer he sought to enforce the contract when he knew it was not in the power of the appellee to convey to him more than the 42 acres; and, while he did not in terms say so, it is evident that he then only sought a conveyance for so much of the 106 acres as had not been sold under the decree of the United States court.

So much of the answer as sought to set up the alleged indebtedness of the appellee, on account of the matters therein stated, was

properly refused because it came too late. The facts, if they existed as alleged, must have been known to him when he filed the original answer, and no excuse is given for a failure to set them up then.

Wherefore the judgment is *affirmed*.

Judge Hines not sitting.

Bush & Porter, N. A. Porter, for appellant.

Rodes & Settle, for appellee.

F. BRACKMAN'S ADM'R v. M. F. ALLISON, ET AL.

[Abstract Kentucky Law Reporter, Vol. 1—278.]

Judicial Sale of Real Estate.

Where real estate is sold at judicial sale in the settlement of an estate, and no one is complaining and filing exceptions except the purchaser, the sale, not being void, vests in him the title, and when all the parties to the record are satisfied with such sale such sale should be confirmed.

APPEAL FROM TODD CIRCUIT COURT.

September 29, 1880.

OPINION BY JUDGE PRYOR:

It is not necessary to determine in this case the constitutionality of the law requiring real estate to be valued when sold by the judgment of a court of equity, in so far as it affects liabilities incurred prior to its enactment. There is no one complaining but the purchaser, and no exceptions filed to the report of sale except by him. The sale is not void, but vests him with title; and when all the parties to the record are resisting the motion to set the sale aside, in what danger can the purchaser be placed by its confirmation? This is an action to settle an insolvent estate to pay debts. The administrator and heirs of the decedent are all parties to the record. Some are married women, and one an infant; yet they are as much bound by the judgment as an adult. Besides, in this case the infant, by his statutory guardian and guardian ad litem, and the married women and their husbands appeared in the court below and are resisting the motion of the purchaser in this court as appellants.

The order setting the sale aside is *reversed* and cause remanded with directions to confirm it.

H. G. Petrie, W. L. Reeves, for appellants.

G. Terry, S. H. Perkins, B. T. Perkins, Jr., for appellees.

R. HOE & CO. *v.* A. D. BULLOCK, ET AL.

[Abstract Kentucky Law Reporter, Vol. 1—313.]

Validity of Lien.

A lien good between the parties is good against purchasers from or creditors of the person creating the lien, where they have notice of it before they have acquired a legal right to the thing in lien or its proceeds.

Rights of Mortgagee of Personalty.

Before a mortgagee of personal property can be adjudged to have priority over another lienholder he must show that his mortgage embraces the property upon which the other lienholder holds a claim.

APPEAL FROM KENTON CHANCERY COURT.

October 2, 1880.

OPINION BY JUDGE COFER:

The only questions of difficulty or importance arising on the record grow out of the conflicting claims of Hoe & Co. and Bullock to the Hoe Press. We decided in *Greer v. Church*, 13 Bush 430. that a contract, very similar to the contract between Hoe & Co. and W. B. Jones, was a sale, and that, whatever might be the rights of the seller as against the purchaser, a sub-purchaser who bought without notice of the terms of the contract, would not be affected by it: and we adhere to that ruling, and need not repeat nor add to the reasons given for that conclusion.

But we intimated in that case, and in *Vaughn v. Hopson*, 10 Bush 337, that, as between the parties, the seller would have a lien for the unpaid purchase-money. It must now be regarded as the settled law of this state that a lien good between the parties is good against purchasers from or creditors of the person creating the lien, if they have notice of it before they have acquired a legal right to the thing in lien or its proceeds. It was held in *Righter v. Forrester*, 1 Bush 278, after full argument and a review of the former decisions of the court, that the holder of an unrecorded mortgage, notice of which was brought to an execution creditor and the purchaser at a sale under the execution, by recording the mortgage after the levy and before the sale, had an equity superior to the right of such purchaser. In *Low v. Blinco*, 10 Bush 331, the authorities were again reviewed, and the doctrine in *Righter v. For-*

rester approved and followed, and the same rule was announced in the more recent case of *Barney v. Cox*, Mss. Opin.

The particular form in which a lien is created is not material. The transaction between Hoe & Co. and W. B. Jones created a lien valid against Jones; and as notice of it has been brought to all the creditors of Jones before any of them have perfected their right to the press or its proceeds, the equity of Hoe & Co. is superior to that of any other creditor, unless the press was embraced in the mortgage to Bullock. His mortgage has been regularly recorded, and he thus acquired a legal right. Being supported by the legal title, his junior equity, if it attached to the property in contest, is superior to the prior equity of Hoe & Co.

At the time the mortgage was executed, there were three printing presses on the premises belonging to Jones. The mortgage conveyed the following described personal estate, to wit: "Printing press, machinery, stock in trade, store fixtures, and all the material pertaining to the printing and stationery business, located in tenement No. 402, Scott street, on the southeast corner of the said Scott street and Fourth street, and carried on by the said Jones."

This language does not include more than one printing press, and the parol evidence, whether competent or not, fails to prove affirmatively that the press in contest was included in the mortgage. Hoe & Co. have the prior equity. There is no doubt that they have a lien. Bullock seeks to overreach that lien, with his junior mortgage, and before he can do so he must show that the mortgage embraces the press purchased of Hoe & Co., and having failed to do so his claim to priority must fail. An ingenious argument is made to show from circumstances that the Hoe press was intended to be mortgaged. The mortgage was signed in the house where the press was situated, and Bullock had it in his power to remove all ground for doubt or uncertainty; and, having neglected to do so, he has no right to ask this court to speculate as to the intention of the mortgage at the expense of Hoe & Co., whose lien is beyond dispute. One who had it in his power to make a matter plain and unmistakable, and neglects to do so, should suffer rather than one about whose right there exists no doubt.

We are therefore of the opinion that the court erred in not adjudging that Hoe & Co. should be first paid out of the proceeds of the press purchased from them. Judgment *reversed* and cause re-

manded for further proper proceedings not inconsistent with this opinion.

Fisk & Fisk, A. A. Ferris, for appellants.

Benton & Benton, for appellees.

JOHN M. SHAW, ET AL., v. JOHN E. ABRAHAMS, ET AL.

[Abstract Kentucky Law Reporter, Vol. 1—314.]

Bond for Deed.

Where a husband purchases real estate and accepts a bond for a deed made payable to his wife and children, the vendor, not being notified of the delivery of such bond by the husband to his wife and children, and knowing that the purchase price was paid by the husband, who presents the bond, may legally convey the property to the husband.

APPEAL FROM HENRY CIRCUIT COURT.

October 5, 1880.

OPINION BY JUDGE PRYOR:

It is certain in this case that Abrahams had no notice of the delivery of the bond of Shaw to his wife and children, and the latter, having paid the purchase money out of his own pocket, produces the bond and directs Abrahams to make a conveyance of the house and lot to other parties. These third parties assumed the balance that was due to Abrahams, and for the balance due conveyed certain property in the south to the wife and children. This conveyance was afterward canceled by the consent or direction of Shaw and wife, and a deed made directly to them by Caldwell and Crabb, to whom the Abrahams property was conveyed. This shows that the parties were not actually selling or purchasing property for their children, but using their names as a convenient mode of entrapping others. It is manifest that Shaw paid for the Abrahams property out of his own means, and Abrahams, knowing this fact and finding the bond for title in Shaw's possession, made the deed in accordance with his directions. Although the bond had been executed to the wife and children, it was a voluntary act, and amounted to no gift until actually delivered, and although there is proof conducing to show such delivery, we think it more charitable to the appellants to take the view adopted by the court below than to convict the father of such a glaring fraud as must of necessity have

been practiced in this case, if this judgment should be reversed. The southern property has been sold with the same change made in the conveyances, and no chancellor, if it could be avoided, should blacken the character of the father that an estate might be secured to his children.

Judgment affirmed.

E. E. McKay, for appellants.

Harwood & Carroll, Webb & Masterson, for appellees.

AUDITOR v. ROBERT BOYD, ET AL.

[Abstract Kentucky Law Reporter, Vol. 1—349.]

Right of Witnesses to Claim Fees.

Witnesses who attend examining trials where felonies are charged are entitled to witness fees, as well as when attending trials on indictments for felonies.

APPEAL FROM FRANKLIN CIRCUIT COURT.

October 6, 1880.

OPINION BY JUDGE HINES:

In *ex parte Herrick*, 78 Ky. 23, we held that the act of December, 1796, in regard to the "examination and trial of criminals," was still in force. That act by its terms applies to examining trials on the charge of felony, as well as to trials on indictments for felonies. To cause the right of the witness to claim and be paid for his attendance to depend upon the charge of felony being made out would be to offer a permission and to hold forth an inducement for the witness to swear falsely. The right to claim and be paid attendance depends upon the character of the charge, and not upon the ultimate result of the examination or trial. The case of *ex parte Herrick* is conclusive of this.

Judgment affirmed.

P. W. Hardin, for appellant. J. & J. W. Rodman, for appellees.

W. A. ROUSE *v.* WILLIAM HUGHES, TRUSTEE.

WILLIAM HUGHES, TRUSTEE, *v.* WESTERN FINANCIAL CORPORATION, ET AL.

L. L. WARREN *v.* SWEARENGER & BIGGS.

[Abstract Kentucky Law Reporter, Vol. 1—320.]

Partnerships.

A partnership has the right to borrow money to carry on its business and to bind each and every member of the firm, and it is not incumbent on the person loaning the firm money to see that the money is applied to the business of the firm.

Trustee's Right to Employ Attorney.

A trustee has a legal right to employ attorneys to represent him, and the fact is not changed because creditors also employ attorneys to collect their claims. Attorneys employed by a trustee may legally be paid a reasonable compensation out of the trust estate.

APPEALS FROM LOUISVILLE CHANCERY COURT.

October 7, 1880.

OPINION BY JUDGE PRYOR:

It is evident that Swearenger and Biggs were partners, or constituted a part of the firm of Anderson, Hamilton & Co. in packing pork in the winter of 1875-6. The fact of their being interested in this pork adventure was known to many of the business men of Louisville; and all of the appellees in this case, except Warren, seem to have dealt with the Hamiltons, not only on the credit of the original firm, but also on the credit of Swearenger and Biggs, who were members of the new firm. Hamilton & Co. had the right to borrow money and incur all the necessary expenses connected with such an enterprise, and to bind each and every member of the firm for the debts contracted. It was not the duty of those loaning Hamilton & Co. money or discounting their paper to see to its application. If the credit was given to Swearenger & Biggs, as well as to the Hamiltons, the former were liable because they were partners in the undertaking, and it was their duty and not the duty of the creditor to see that the money was rightfully appropriated. Warren, it seems, gave credit to the pork adventure, and loaned his money, as he had been doing for years, to the same firm, or rather the firm name, that had existed for years, and continued to exist after Swearenger and Biggs became interested in the speculation

of 1875-6. That Hamilton & Co. No. 1 was different from Hamilton & Co. No. 2 was a fact not communicated to Warren, and as he dealt with the firm of Hamilton & Co. on the faith and credit of the product belonging to Hamilton & Co., and in which Swearer and Biggs were interested, if either must suffer it must be the latter and not Warren.

We think, therefore, that no error has been committed in the distribution of the assets by the chancellor. Warren insists, however, that he is entitled to a judgment against Swearer & Biggs for the balance due him because of the failure of the latter to comply with the agreement under which they claim to be released. The assets of the pork adventure were transferred to Hughes, the trustee, at the instance of creditors, and among the assets were embraced the notes of Swearer & Biggs for \$66,000. The assets were received and collected by Hughes, and were accepted by the creditors in satisfaction of any claim they held against Swearer & Biggs. The receipt of the trustee, Hughes, designates the property delivered. The execution of the notes and mortgage all recite on their face that it was executed in pursuance of the agreements made with the creditors. These agreements have all been substantially complied with, and the creditors, including the appellant, Warren, have received a part of the assets.

It is urged, however, that Swearer & Biggs, by virtue of the agreement to release executed by Warren, bound themselves to recite the agreement they had made in the transfer they made to the trustee. The agreement was referred to in the transfer by reciting that it was made in pursuance of the agreement with creditors; and while there is not a literal compliance by executing the whole of the contract with Warren, it is a substantial compliance with its terms. No other creditor is complaining, and Warren, among the others, has received through their trustee, the pork and money of Swearer and Biggs in accordance with their agreement, and have, in fact, been paid a part of the proceeds; and it is now too late to disturb this equitable adjustment upon such a technical objection.

Nor will this court reverse by reason of the allowance made to the attorneys of the trustee. There is no objection to the amount allowed, or any intimation that the allowance is for too great a sum; but the question made is,—As the creditors have employed counsel, as a matter of necessity, to present and prosecute their

claims in order to determine their respective rights, and have paid their own counsel, should the trustee, or his attorney, be allowed compensation out of this fund? It was certainly the duty of the trustee to see that the settlement was properly made, and to resist (in good faith) the payment of any claim that he thought unjust, or to prevent, if he thought it inequitable, priority in the distribution of the assets. If he employed counsel for such a purpose, as it was his duty to do, and there is nothing in this record to the contrary, why is not counsel entitled to compensation, and if not paid out of this fund who is to pay the fees of the attorney? The trustee, if his allowance is disregarded, must account to counsel to the extent of the value of his services out of his own pocket, and if such should be the decision in this case there would be no inducement to fiduciaries to be vigilant in protecting a trust fund.

It is not to be presumed that the trustee is making money for his attorney by an unnecessary employment in the absence of proof, and as there is nothing in this record showing bad faith either on the part of the trustee, or his attorney, and no attack upon the allowance below in the way of testimony showing that it was exorbitant, the allowance we must adjudge was properly made. These cases have been considered together. The judgment on the appeal of Hughes, trustee, against the Western Financial Corporation and others is *affirmed*. The judgment on the cross-appeal of Warren in the same case is *affirmed*. The judgment in the case of L. L. Warren against Swearer & Biggs is *affirmed*. The appeal in the case of Rouse against Hughes, trustee, is *dismissed*—barred by limitation.

T. E. McKay, W. O. Dodd, Russell & Helm, for Wm. Hughes, Trustee. Young & Boyle, for Rouse.

H. C. Pindell, for Warren.

Harlan & Willson, for Sherlay's Ex'rs.

Bigger & Davie, for Swearer & Biggs.

E. H. Gipson, for Western Financial Corporation.

H. Pope, for Bank of Louisville.

A. K. LEWIS v. MILTON EVANS.

[Abstract Kentucky Law Reporter, Vol. 1—349.]

Building Contract.

The completion and use of a building by the owner, where the contractor fails to complete it, does not necessarily amount to a waiver of his objection to the quality of the work.

Waiver of Failure to Complete Contract.

In an action by a contractor on a contract to build a barn, its completion being a condition precedent to payment, must be proven or an actual waiver shown.

APPEAL FROM ROBERTSON CIRCUIT COURT.

October 7, 1880.

OPINION BY JUDGE HARGIS:

The appellant in his answer admitted making the contract by which he agreed to pay appellee a certain price for building for him a barn on his wife's land, which land he and she occupied, but denies that he forced appellee to abandon the work before it was completed, and alleged that payment was to be made on that event, and admitted that he took possession of the unfinished barn and completed it.

The allegations of the answer were by consent traversed upon the record. The completion and use of the barn by appellant in order to save his tobacco from loss did not necessarily amount to a waiver of his objections to the quality of the work, as is the case in accepting the possession of movables, upon which work has been done, without any return of the article so soon as defective performance has been discovered. The barn is a part of the realty and appellant was not bound to quit his possession of the land in order to avoid a waiver of his objection to the quality of the work. In an action upon the covenant of appellant to pay for the barn, its completion being a condition precedent to payment, must be proved or an actual waiver shown.

But this action is on a quantum meruit for the labor done on the barn, connected with any excuse for failing to complete it. It appears by the pleadings that appellee did not finish the barn and that appellant completed it. There is nothing in the record showing whose fault caused appellee to quit work. The fact that appellant did accept the benefit of appellee's labor by taking possession of the barn destroys his right, under the circumstances of this case, to insist upon its completion as a condition precedent to the payment therefor, but does not deprive him of the right to question the quality of the work, which he was permitted to do in the trial below, and the value of the work found by the jury is sustained by the evidence.

The judgment is therefore *affirmed*.

Winfield Buckler, for appellant.

H. V. LOVING, ET AL., *v.* WARREN COUNTY.

[Abstract Kentucky Law Reporter, Vol. 1—340.]

Evidence of Signature.

Where a non-expert witness states that a signature purporting to be his is not his, and that he knew his own signature from that written by others, it is improper and inadmissible in testing his knowledge on cross-examination to produce papers with a large number of signatures pasted on them purporting to be his signature, and ask him to tell the jury which of these signatures were genuine and which were not.

APPEAL FROM JEFFERSON COURT OF COMMON PLEAS.

October 8, 1880.

OPINION BY JUDGE PRYOR:

The real issue in this case is as to the signature of Thomas, the county judge, to the bonds in controversy; and while the testimony of Thomas had, no doubt, a controlling influence with the jury, and although he may have been mistaken as to his own handwriting, the mode proposed by counsel to invalidate his statement, or rather to destroy the effect of his testimony, was properly rejected by the court. While the witness answered that he knew his signature from that of Clark or anyone else, he did not pretend to be an expert, and was not willing to say that in all cases he could distinguish his genuine signature from the imitation or forgery. After his statement that the signature to the bonds purporting to be his was not genuine, counsel, with a view of testing his capacity for judging the genuineness of his own signature, produced papers with nineteen signatures pasted on them purporting to be the signature of the witness, and asked him to tell the jury which of the signatures were genuine and which were not. This paper, with nineteen detached signatures, would have made as many as nineteen immaterial issues, and such an examination of the witness would have resulted, no doubt, in his failure to sustain himself as an expert before the jury; nor would it establish the fact that the witness had signed the bonds, when upon an examination of the entire writing to which the signature was attached he was able to say that he never signed it. Very few persons, other than experts, observe their own signatures or handwriting so closely as not to be deceived by *that* which is a mere imitation of the original, and written for the very purpose of misleading.

It would be unjust to the witness, as well as the formation of new issues that would lead to an interminable trial, to permit him to be examined in such a mode. There is no reply more natural than for the witness to say, when examined as to his own handwriting, that he would know it from the handwriting of others; and still such a response does not make him an expert as to his own handwriting. Yet it would be an unfair test to submit to him a number of isolated signatures purporting to be his, and require him to recognize the genuine from the forgery. 1 Wharton's Law on Evidence (2nd ed.), Sec. 710; *North American Fire Ins. Co. v. Throop*, 22 Mich. 146; *McAllister v. McAllister*, 7 B. Mon. 269.

The appellants could not have been prejudiced by the statement of Gardner in regard to Clark, or the statement of Galt as to his having seen the bond on the trial of Clark. The entire defense made by the county was on the theory that the bonds had been signed by Clark, and not by Thomas. The latter stated that in his opinion the signature was in the handwriting of Clark, and the jury, by the very nature of the defense made, knew that Clark was charged with the forgery. The reference, therefore, to Clark by these witnesses could not have influenced the jury in finding for the appellee.

Nor do we perceive any error in the court's refusing to permit Allison to testify as an expert. The court heard the statement of the witness, and adjudged that he was not competent; besides, a number of experts had been examined and the weight of the testimony, so far as they testified, may have been on the side of the appellant. At least the exclusion of this testimony, if competent, could not have prejudiced the case, as many experts had already testified to the same facts about which this witness was called to speak. Other errors have been assigned that we regard as immaterial, one or two witnesses on each side, after being examined, were called back and re-examined, and their statements were not material either way.

We have not given the instructions in this case a careful consideration, for the reason that the interrogatories upon which the special findings are based presented the entire case of the plaintiff in every phase, and must be regarded as conclusive of this case. The jury was required to answer and say whether the signature to the papers was that of Thomas, and they responded in the negative. They were required to answer and say whether the bonds, or any

of them sued on, were delivered to the treasurer of the sinking fund of Warren county, or sold by the county judge, or by any person appointed by him, and the response was again in the negative. They were then required to state whether either of these officers had received any of the proceeds of the sales of the bonds in dispute, and there was a negative response. They were again asked if any of the bonds in controversy were signed by the county judge, and the response was in the negative.

It was deemed important to ascertain whether any of the officers of the county authorized to receive the bonds, when issued, had at any time in their possession the bonds held by the appellants, and if not, whether they had received the proceeds of the sale of the bonds. All these special findings were favorable to the appellee, as well as the general verdict.

The only issue really was,—Did Thomas, the county judge, sign the bonds? The county never received any of the money for which they were sold, and the finding by the jury that the signature to the bonds was not in the handwriting of Thomas must determine this controversy.

Judgment *affirmed*.

Judge Hines not sitting.

W. O. & J. L. Dodd, Simrall & Bodley, for appellants.

Bigger & Davie, for appellee.

[See *Loving v. Warren County*, 14 Bush (Ky.) 316, cited in *Branson v. Commonwealth*, 92 Ky. 330, 13 Ky. L. 614, 17 S. W. 1019; *Buckles v. Commonwealth*, 113 Ky. 795, 24 Ky. L. 571, 68 S. W. 1084; *Louisville Southern R. Co. v. Hooe*, 18 Ky. L. 521, 35 S. W. 266, 38 S. W. 131; *Kistler v. Slaughter*, 20 Ky. L. 1937, 50 S. W. 529; *Spencer v. Society of Shakers*, 23 Ky. L. 854, 64 S. W. 468.]

CITY NATIONAL BANK OF PADUCAH *v.* J. R. SMITH.

[Abstract Kentucky Law Reporter, Vol. 1—351.]

Renewal of Bills Secured by Collateral.

The renewal of an obligation will not release bonds held by the creditor as collateral security for the debt, but where such renewals are by new firms and with new parties to the bills, without the knowledge and consent of the owners, it will amount to a surrender of all claims to hold the bonds as collateral.

APPEAL FROM McCracken Court of Common Pleas.

October 8, 1880.

OPINION BY JUDGE HINES:

The court to which the law and facts were submitted without a jury was authorized from the evidence to find that appellee consented that his bonds should be used as collateral security for Corbett & Peterson alone, that the bank had notice of that fact, and that the bonds belonged to appellee prior to the maturity of the loan for which the bonds were deposited, and prior to the renewal by the firm of Corbett, Peterson & Co. Having knowledge of these facts, appellant had no right to hold the bonds as collateral security for the renewal by Corbett, Peterson & Co. and Peterson, Gardner & Ryan. Such renewals by these new firms and with new parties to the bills, without the knowledge and consent of the appellee, was a surrender of all claim to hold the bonds under the agreement with Corbett & Peterson for the \$5,000 loan.

There appears to be no reason for disturbing the judgment because the court heard evidence of the value of the bonds in the absence of counsel for the appellant. It is not claimed that the value fixed by the court is not the correct one, and besides, the court offered to permit appellant to introduce additional evidence as to the value of the bonds, which appellant refused to do unless the court would set aside the entire judgment. There is nothing to indicate that appellant has suffered any injury by the introduction of this evidence in the absence of its counsel.

Wherefore the judgment is *affirmed*.

Bigger & Reid, for appellant.

William Lindsay, J. C. Gilbert, for appellee.

MITCHELL MURPHY, ET AL., v. W. L. JETT.

[Abstract Kentucky Law Reporter, Vol. 1—339.]

Jurisdiction of Quarterly Court.

The circuit courts have exclusive jurisdiction over judgments rendered by justices when the amount in dispute is not less than \$10, and the quarterly court has no jurisdiction to render a judgment on appeal from a justice where the judgment is for \$10 or more.

APPEAL FROM WASHINGTON COURT OF COMMON PLEAS.

October 8, 1880.

OPINION BY JUDGE PRYOR:

By reason of the bond executed by the appellants they became liable for the debt and costs. When suit was instituted on the bond

the amount of the debt was \$16 and the cost \$39. These two sums constituted the claim of the appellee, and for that amount the judgment was rendered in the common pleas court. While the extent of appellants' liability was the sum fixed in their bond, yet the appellee claimed more and obtained a judgment for it.

By the Act of March, 1876, the circuit courts were given exclusive jurisdiction over judgments rendered by justices when the amount in controversy is not of less value than \$10, so the quarterly court had no jurisdiction to render a judgment against the appellant on the appeal from the judgment of the justice; and the appellant having appealed from that court to the common pleas court, the latter should have entered a judgment directing the quarterly court to dismiss the appeal. *McKiltrick v. Peters*, 5 Dana 589; *Bassett v. Oldham*, 7 Dana 168; *Fleming v. Limebaugh*, 2 Met. 267.

Judgment *reversed* and cause remanded for further proceedings consistent with this opinion.

J. W. Lewis, for appellants. W. L. Jett, for appellee.

IVAN MOORE AND WIFE *v.* F. S. MILLER.

[Abstract Kentucky Law Reporter, Vol. 1—322.]

Duress in Execution of Mortgage.

It does not constitute duress where, at the time that the wife acknowledges a mortgage before the clerk of the court, the officer stated to her that in case of the death of her husband the mortgage would secure the payment of the debt due the mortgagee, and that such mortgagee would enter suit unless the mortgage was signed. Such statement does not destroy the force of the clerk's certificate that her acknowledgement was made voluntarily before him.

Interest on Note Due One Day After Date.

Where a note is drawn one day after date with 10 per cent. interest from date, it will be held that the parties intended to contract for that rate from date until paid, there being no appreciable time between the date of the note and the time it becomes due.

APPEAL FROM ESTILL CIRCUIT COURT.

October 9, 1880.

OPINION BY JUDGE HARGIS:

The mortgage purports to grant the whole estate of Moore and wife in the land conveyed by it. The acknowledgment of the wife

was not procured by duress, but, as she states, by her voluntary act. The statement made to her by the clerk at the time she directed him to sign the mortgage for her, that in the case of the death of her husband it would secure Miller's debt, for which he would sue him unless the mortgage was signed, and that if she did not want to sign it she need not sign it, is not sufficient to destroy the force of the clerk's certificate that her acknowledgment was made in due form.

The mortgage included the right of homestead, and was properly signed and acknowledged. This mortgage was given to secure the sum of a note which was given in renewal of notes executed and owing by Moore for the purchase money for the identical tract of land conveyed to Miller by the mortgage, and until the purchase money shall be paid for the land no homestead exemption can be interposed as a bar to an enforcement of its collection.

It is true that the excess of interest over 6 per cent. secured by the mortgage is not purchase money, but as there is no defect in the mortgage it secures that part of the interest. The note was drawn one day after date with 10 per cent. interest from date. The proper construction to be placed upon these words is that the parties intended by them to contract for that rate of interest "until paid." There is no appreciable time between the date of the note and the time it becomes due, and the parties surely did not mean to contract for 10 per cent. during one day and then for 6 per cent. thereafter. This construction would contravene by common sense the evident intention of the parties and overturn a former adjudication of this court.

Perceiving no error in the judgment, it is *affirmed*.

J. B. White, for appellants. I. N. Cardwell, for appellee.

[Cited, *Hensley v. Webb*, 31 Ky. L. 87, 101 S. W. 375.]

GEORGE SMITH v. T. J. RATCLIFFE, ET AL.

[Abstract Kentucky Law Reporter, Vol. 1—316.]

Levy and Sale of Property.

Land encumbered by lien may be levied upon and sold by a creditor subject to such lien, notwithstanding a court of equity has, prior to such levy, acquired control over the property by attachment or otherwise.

Jurisdiction of a Court of Equity.

A court of equity has no jurisdiction to subject land to sale to pay a judgment when the plaintiff in such an action has a complete remedy by execution on his common-law judgment. He cannot resort to equity when he has a complete legal remedy.

APPEAL FROM NICHOLAS CIRCUIT COURT.

October 9, 1880.

OPINION BY JUDGE HINES:

Appellees, having a personal judgment against appellant and return of "no property," instituted this action in equity to subject a piece of land, the legal title to which was in appellant, and also prayed personal judgment for debt and cost. By amended petition it is charged that there is an action pending by the vendor of the land to enforce his lien for purchase money, and with this action the suit of appellees was consolidated. After the judgment to enforce the lien for purchase money, amended pleadings were filed showing that the lien debt had been satisfied, wherefore another personal judgment was entered for appellees and a decree to sell the land to pay the judgment and costs.

Appellant complains and says, first, that the court had no jurisdiction to decree a sale of the land to satisfy the judgment; second, that the personal judgment is erroneous.

Section 1, Art. 14, Chap. 38, Gen. Stat., authorizes a levy and sale under execution of land encumbered by lien for purchase money; and in *Oldham v. Scrivener*, 3 B. Mon. 579, it is held that such a sale may be had notwithstanding a court of equity had, prior to the levy of the execution, acquired control over the property, by attachment or otherwise. The purchaser at such execution sale acquires a lien subject to the encumbrance for purchase money, with 10 per centum interest.

So it appears that appellees had a complete remedy by execution on their common-law judgment, and that there was no necessity to go into a court of equity to subject the land. The petition does not exhibit a case provided for by Sec. 439, Civil Code. It does not seek a discovery of money, choses in action or equitable interests, and to subject such money, choses in action or equitable interests, when discovered, to the payment of the debts; but from all that appears in the petition the legal title to the land sought to be subjected was known by appellees to be vested in appellant at the time

of the institution of the present action. This section of the code was intended to afford relief when the ordinary remedies had been resorted to and failed. It would be oppressive to allow the execution creditor to resort to equity when his legal remedy is complete. *Weatherford v. Myers*, 2 Duv. 91.

It was error to render a second personal judgment, even if there was equity in the petition sufficient to authorize the property to be subjected to the payment of the first judgment. *Smith v. Belmont & Co. Iron Co.*, 11 Bush 390.

Judgment *reversed* and cause remanded with directions to dismiss the petition.

Ross & Kennedy, for appellant. J. H. Halladay, for appellees.

NATIONAL BANK OF LANCASTER, ET AL., v. J. W. SLAVIN'S TRUSTEE, ET AL.

[Abstract Kentucky Law Reporter, Vol. 1—315.]

Dower Interest of Widow.

Where a widow conveys her dower interest in land, taking notes for the purchase price, but reserving a lien on such interest to secure the payment of the purchase money, she may enforce such lien against the creditors of her grantee; and the fact that there was included in such notes certain other indebtedness to her from such grantee will not prevent her from enforcing her lien to the extent of such purchase money, where the sum due on such lien can be ascertained.

Homestead Claim of Bachelors.

Bachelors residing on land with a nephew and brother cannot legally assert a homestead right, where the brother is of full age and has the mental and physical ability to maintain himself, and the nephew has parents living able to support him during his minority, and such bachelors have no control over him except such as is sanctioned by his parents.

APPEAL FROM GARRARD CIRCUIT COURT.

October 12, 1880.

OPINION BY JUDGE PRYOR:

John L. and J. W. Slavin qualified as executors of the will of their father, Jas. G. Slavin, and sold his landed estate under a judgment of the Garrard Circuit Court. E. M. Slavin became the purchaser, and conveyance was made him retaining a lien for the pur-

chase money. Prior to the date of the sale to E. M. Slavin, the executors had purchased from their stepmother, Julia Slavin, her dower interest in the tract of land, the conveyance reciting the amount of purchase money to be paid and for which their notes were executed. Sharpe's heirs or children were the grandchildren of the testator, and J. W. Slavin, one of the executors, qualified as their statutory guardian.

E. M. Slavin conveyed to J. W. Slavin an undivided interest of one-half in the land, and in the year 1879, the two brothers becoming insolvent, made an assignment of all their estate to a trustee for the benefit of creditors. John L. Slavin having sold his interest in the land to his two brothers, the widow released him from the payment of the note executed for her dower and took from J. W. Slavin and E. M. Slavin their note for the amount, and included in this note other amounts due her unconnected with the land. The trustee filed his petition in equity, making the creditors and all parties in interest defendants with a view of having a proper distribution of the assets. The heirs of Sharpe filed an answer and cross-petition, in which they claim a lien on the land sold, and therefore a preference over other creditors. The widow asserted a lien on her dower interest and claimed priority to that extent.

The two brothers making the assignment were both unmarried but living on the land with a nephew and brother. They assert their right to a homestead.

The chancellor granted the relief sought on all the cross-petitions, and the assignee and the creditors have brought the case to this court. There is nothing in the record showing or conducing to show that any of the purchase money was paid for the land except the interest of John Slavin, and we see no reason why Sharpe's heirs should be deprived of their lien retained by the executors in the conveyance made to E. M. Slavin. After the appointment of J. W. Slavin as the guardian of Sharpe's children he made two settlements in the Garrard County Court, in which he charged himself with the interest of his wards in the purchase money owing by E. M. Slavin, and also by himself, he having become interested with his brother in the purchase. The agreed facts show that the guardian and his surety are both insolvent, but whether so or not the guardian had no right to charge himself with the amount due these infants, unless the purchase money had been paid. He attempted to make the payment in behalf of himself and brother by charging

himself as guardian with the amounts due the infants. This cannot be done, and the lien of the infants was properly enforced.

It is argued that the widow made the conveyance to the executors to enable them to pass by their conveyance the absolute title to the land. This was, no doubt, the object in view; still, the widow retained a lien on her dower interest to secure the payment of the amount due her by the executors, and this lien she can enforce unless she has by her subsequent action deprived herself of that right. John and J. W. Slavin executed to her the notes for her dower interest, and John having sold all the interest he had in the land to E. M. Slavin, the joint note of E. M. Slavin and J. W. Slavin was accepted in lieu of the original note. It was for the purchase money of the widow's dower and executed on that consideration alone, E. M. Slavin being substituted as the purchaser in lieu of J. W. Slavin. It is not pretended that it was the purpose of the parties to release the lien, or that any part of the purchase money has been paid the widow; and the acceptance of the note of E. M. and J. W. Slavin was neither a waiver of the lien or such a change in the contract as affected the rights of the widow, in her claim of priority as against the creditors of these insolvents. The fact that the note was executed for a larger amount than was really owing her on the sale of her interest does not affect her lien. The amount embraced in the note and constituting the lien was easily ascertained. There is no uncertainty in the mind of the chancellor as to the extent of the lien and the amount of purchase money, and the lien can as readily be enforced as if the consideration of the note had been evidenced by distinct obligations.

The remaining question to be considered is the claim to a homestead by the appellees. The weight of the testimony conduces to show that the brother living with the appellees, while a little eccentric, has the mental and physical ability to maintain himself; and the nephew, that one of the appellees claims to have adopted, has parents living who are able to support him. From the facts before us there is neither a material nor legal obligation on the part of the bachelor brothers, or either of them, to provide for or maintain either of these parties whose claims upon them they now insist entitle them to a homestead. The appellees have no parental control over the infant nephew, except such as is sanctioned by the parents, who can at any time assert their right to the care and custody of their child. There is no liability on the part of either to main-

tain and educate the infant, and having parents amply able to provide for all his wants it would be unjust, under the circumstances, to exempt any part of this estate for the support of this infant at the expense of creditors.

In *McMurray v. Shuck*, 6 Bush 111, the debtor had an unmarried sister and two brothers under age living with him, without means (their parents being dead), and whose support and education the debtor had assumed. In the case of *Brooks v. Collins*, 11 Bush 622, the widow had living with her a widowed daughter depending upon her for a support and maintenance, while in this case the appellees are under no legal or natural obligation to support the nephew, the father being able to provide for him, and the brother, although not willing, is perfectly able mentally and physically to support himself.

We think the court below erred in allowing the appellees a homestead, and to that extent only the judgment is *reversed* and cause remanded for further proceedings.

Dunlap & Dunlap, Anderson & Herndon, for appellants.

W. O. Bradley, for Sharpes. Burdett & Hopper, for Slavins.

[Cited, *Ramsey v. Ferguson*, 32 Ky. L. 1033, 107 S. W. 779.]

ALLEN MURPHY, ET AL., v. DUDLEY HAMBLETON, ET AL.

[Abstract Kentucky Law Reporter, Vol. 1—353, as *Allen & Murphy v. Hambleton*.]

Description in Mortgage.

Where the number of a lot mortgaged is incorrectly given in the mortgage, but the description otherwise is amply sufficient to identify the property, no one can be misled by it and it is sufficient.

Conveyance Subject to Lien of Execution.

The conveyance of real estate by the owner will not destroy a lien created by an execution.

APPEAL FROM BRECKINRIDGE CIRCUIT COURT.

October 13, 1880.

OPINION BY JUDGE PRYOR:

The mortgage of Fisher to the appellees passed to the latter the lot in question in pledge for the payment of the debt therein specified. The word "homestead" used in the mortgage was intended to identify the property sold. It was not the right to a homestead

that was sold, but the homestead itself, the place of residence by the grantor.

The number of the lot may have been improperly given, but the description otherwise is amply sufficient to identify the property, and no creditor or purchaser could have been misled by it. The levy and sale by the appellants under the execution created a lien subordinate to the mortgage, and the subsequent conveyance by the owner to the appellees did not destroy the lien created by the execution; nor has the execution creditor released it by any act of his, but on the contrary has shown a determined purpose to enforce it. This case being in equity, and the contest being between the mortgage lien and that created by the execution, the chancellor should have subjected the property to sale, first satisfying the mortgage claim and then the claim of the execution creditor. The subsequent conveyances by which each party claims to hold the absolute title has not defeated the prior liens, and the deed by the sheriff should be cancelled.

Judgment *reversed* and cause remanded.

Kinchelve & Eskridge, for appellants.

Williams & Powers, for appellees.

JAMES M. CAMPBELL, ET AL., v. MARGARET ROYCE, ET AL.

Ownership of Land Abutting Highway.

A conveyance calling for objects on the margin of a highway and running with it passes the fee to the center of such highway, where there is nothing in the deed to show a contrary intent.

APPEAL FROM JEFFERSON COURT OF COMMON PLEAS.

October 13, 1880.

OPINION BY JUDGE COFER:

Waiving all other questions, we are of the opinion that the judgment must be affirmed on the ground that the deeds to Sullivan and Pope passed the fee to the center of the then existing public road, running between the lots conveyed to them respectively.

Chancellor Kent says it may be considered as the general rule that a grant of land bounded on a highway or river carries the fee in the highway or river to the center of it, provided the grantor at the time owned to the center, and there be no words or specific de-

scription to show a contrary intent; and the rule seems to be the same whether the highway be referred to in the conveyance or not. Angel on Highways (3d ed.), Sec. 314; *Camplin v. Pendleton*, 13 Conn. 23; *Peck v. Smith*, 1 Conn. 103.

This rule has been adopted because it will generally give effect to the intention of the parties. A vendor owning land on both sides of a public highway cannot be supposed, when he sells, to look forward to the possible abandonment of the use by the public, and to intend to reserve to himself the reversion, especially so when land is cheap and there are no circumstances to indicate such an intention except the single fact that his deed calls for the margin of the highway.

Highways, especially in the country, are often changed, and sometimes in towns and cities. To adopt the rule contended for in this case, that a conveyance, calling for objects on the margin of a highway and running with it only passes the fee to the objects called for, would not only defeat the intention of grantors in ninety-nine cases in every one hundred, but would in many instances lead to litigation, confusion and uncertainty.

There are cases which hold this doctrine, but they are opposed to the weight of authority and, in our opinion, are not supported by sufficient reasons. Counsel cite *Fleming v. Kenney*, 4 J. J. Marsh. 157, as sustaining this view, but we do not so regard it.

The bond called for the bank of the creek, and to run with its meanders, and Fleming complained in this court that the court below, in enforcing specific performance, did not include one-half the creek within the one hundred ten acres called for in the covenant. He failed to show that he owned any part of the creek, and that was an end of that part of his case, and the court said it would not say how far the literal import of the bond might have been affected by the fact if it had appeared that he owned the land to the center of the creek; but this, as well as what follows, which seems to indicate if the literal terms of the bond were departed from at all, the line would be carried to low water mark, on the opposite side, was entirely outside of the case before the court, and therefore does not amount to an authoritative decision of the point.

Judgment affirmed.

Young & Boyle, Lewis Collins, for appellants.

Thos. Speed, for appellees.

JAMES F. PONDER v. JAMES P. WEBB, ET AL.

[Abstract Kentucky Law Reporter, Vol. 1—335.]

Waiver of Exemption.

A debtor may protect his surety in a replevin bond by surrendering to the sheriff property exempt from execution, and after the sheriff has accepted such property to be sold in satisfaction of the debt, it is then too late for such debtor to object to such property being sold.

APPEAL FROM GRANT CIRCUIT COURT.

October 13, 1880.

OPINION BY JUDGE PRYOR:

In this case there is no list of evidence, and it may be that the appellant surrendered his property in writing; nor are we inclined to conclude that this was necessary. The property was exempt from execution, as we shall infer, but the debtor desirous of protecting his surety in the replevin bond told the sheriff that he would surrender to him this particular property, and to make no levy on that belonging to the surety. If under this arrangement the sheriff failed to levy on the property of the surety, and accepted the exempted property to be sold in satisfaction of the debt, it is too late after its surrender, although the property was left with the debtor, for the latter to object for the first time on the day of sale to its being sold in accordance with the agreement. It is bad faith towards the sheriff, and would subject him to an action by the creditor for failing to make his money, in the event it should be held that no sale should have been made of appellee's property. The jury by a special finding say that the surrender was made, and the debtor, as the record is now presented, must abide the judgment. Besides, it is not alleged in the petition that the property levied on was exempt from execution. It is alleged that the property was levied on by the sheriff, and that the latter knew when he made the levy that it was exempt from execution, and again that when he seized the property he well knew it was exempt from execution.

As the case comes here only on the pleadings and special findings of the jury, we must hold the petition defective, as it is nowhere stated that the property levied on was not subject to the levy and sale made. The appellees' knowledge may be limited on such a subject, and the appellant, or the complaining party, is the one that

must know that the property was exempt, and that fact must be distinctly stated, and not arrived at by way of inference or the knowledge the adverse party may be presumed to have in reference to the alleged wrong.

Judgment *affirmed*.

W. N. Hogan, for appellant. A. G. DeJaneatte, for appellees.

RUSSELL PADGETT, ET AL., *v.* HELEN KIMBROUGH.

[Abstract Kentucky Law Reporter, Vol. 1—353.]

Husband and Wife—Husband's Creditors.

Where a wife owning real estate joins her husband in its sale and conveyance, and he receives the proceeds, invests it in personal property and is permitted to use, trade and sell the property, the wife cannot assert ownership in such property as against the husband's creditors.

APPEAL FROM HARRISON CIRCUIT COURT.

October 13, 1880.

OPINION BY JUDGE PRYOR:

The bond upon which the liability of the surety depends recites the fact that the execution had been levied, and the property sought to be sold claimed by the wife of the debtor; and this admission having been made by the obligors, the only issue to be tried was "whether Mrs. Kimbrough was the owner of the stock and crop levied on by virtue of the execution." The fact of the execution, the levy, &c., was not in issue because it was by reason of execution and levy that the claimant was permitted to give the bond. The evidence in this case is conclusive in favor of the creditor. That the house and lot in Cynthiana belonged to the wife is conceded, but upon the sale of that property the money was taken possession of by the husband, and although, as between the husband and wife, it was understood to be the wife's money, and the husband an agent for her, yet he was permitted to use, trade, buy and sell with this money until most of the property levied on was the result of the investments made by the husband.

The land was rented by the wife with her brother as surety; still, the husband cultivated or assisted in cultivating the crops, and was in fact the ostensible owner of all the property. This is another in-

stance where the wife is trading and contracting as a *feme sole* without any authority from the chancellor. There was, so far as creditors are concerned, a complete conversion of the proceeds of the wife's real estate by the husband, and after using the money, by purchasing stock and making other investments of which he is the apparent owner, the understanding or agreement between himself and wife constitutes no barrier to the claims of creditors. See *Uhrig v. Horstman*, 8 Bush 172; *Moreland v. Myall*, 14 Bush 474.

The lien of the landlord, if he has any, may be enforced, or the surety protected to that extent, if any lien exists. It was the general estate of the wife that was sold by the husband and wife originally, and the proceeds he has been using for several years; and as against the claims of creditors it is now attempted to impress the property (personal) in which these investments have been made with the character of separate estate in the wife. This cannot be done upon such facts as are presented by this record. If the wife desires to trade as a *feme sole*, and to appoint her husband as the agent, the mode of doing so is provided by the statute.

Judgment reversed and cause remanded for further proceedings.

T. T. Forman, W. H. Ratcliffe, for appellants.

J. Q. Ward, for appellee.

BUCKWALTER & CAMPBELL v. L. P. BARTLETT, ET AL.

[Abstract Kentucky Law Reporter, Vol. 1—352.]

Innocent Purchaser for Value.

One who accepts a mortgage on real estate or takes an assignment of a mortgage, where there is nothing of record showing any lien by execution, nor of title by purchase under execution, nor any notice, actual or constructive to such mortgagee or assignee of any lien or encumbrance on the land, such mortgagee or his assignee is an innocent purchaser for value.

Levy on Land Improperly Described.

An attempt to levy upon land situated in one range, where the levy and return show a levy upon land in another range, is no levy as against an innocent purchaser for value, and such levy and return cannot be corrected so as to affect the rights of an innocent purchaser.

APPEAL FROM HICKMAN CIRCUIT COURT.

October 13, 1880.

OPINION BY JUDGE HINES:

At the time the mortgage was executed to secure the debt enforced, and at the time of the assignment of the debt to appellants, there was no record evidence of any lien by execution, nor of title by purchase under execution, nor was there any notice, actual or constructive, to appellants of any lien or encumbrance on the land. Appellants stand in the attitude of innocent purchasers for value, exactly as if the mortgage had been executed directly to them at the date of the assignment. An attempt to levy upon land situated in range 4, when the levy and return show a levy upon land in range 2, is no levy as against an innocent purchaser for value, and, therefore, the levy and return cannot be corrected to conform to the intention so as to affect an innocent purchaser. The fact that the payee in the note knew of the existence of the levy does not in any way affect the rights of appellants, any more than a secret agreement between the creditor and the mortgagor would affect them.

Having determined that the controversy on its merits is for appellants we need not consider whether the circuit court had the right to cause to be corrected a levy and return on execution issuing from the common pleas court.

Judgment *reversed* and cause remanded with directions for further proceedings consistent with this opinion.

Geo. L. Husbands, for appellants.

R. H. BAKER *v.* H. G. RATCLIFFE.

[Abstract Kentucky Law Reporter, Vol. 1—352.]

Maturity of Note.

When a petition on a note shows that it was dated October 4, 1875, and due six months after date, and the suit on it was begun on March 31, 1876, it sufficiently appears that the action is begun before the maturity of the note, and such action must fail where no facts are alleged to bring the case within the statute permitting such an action before the maturity of the note.

APPEAL FROM CALDWELL CIRCUIT COURT.

October 13, 1880.

OPINION BY JUDGE HINES:

The motion to dismiss for want of an assignment of errors must be overruled. There appears in the record what purports to be an

assignment, and which is sufficient if it can be treated as filed. It appears in the record, and while in strictness it should have been endorsed filed, we will treat it as if it had been; but in doing so it is suggested that in the future it may be well that counsel look to this, as a case might arise in which justice to litigants would require the fact of filing to be better established.

The petition in this case shows no cause of action. It is alleged that the note sued on was dated October 4, 1875, and due six months after date. The action was instituted on the 31st day of March, 1876, before the maturity of the note, and no facts are alleged to bring the case within the letter or spirit of Sections 237 and 238, the Civil Code.

Judgment *reversed* and cause remanded with directions to dismiss the petition without prejudice.

F. W. Darby, for appellant. G. W. Duvall, for appellee.

W. C. DAVIDSON v. J. H. DAVIDSON, ET AL.

[Abstract Kentucky Law Reporter, Vol. 1—340.]

Appeals from County Court to Circuit Court.

In appeals from the county court to the circuit court, in cases for the partition of real estate, under Sec. 837 of the code, in force in 1880, and sections 20 and 22 of Myers' Code, the jurisdiction of the circuit court is purely appellate, and that court can only pass on such facts as are certified to it from the county court. It has no power to hear such cause de novo.

APPEAL FROM FULTON CIRCUIT COURT.

October 13, 1880.

OPINION BY JUDGE HINES:

This proceeding was instituted in the county court for the division of land, in November, 1876, and under Sec. 837 of the present code is to be governed and regulated by the provisions of Myers' Code. Section 20 of that code gives circuit courts appellate jurisdiction on appeal of such cases, and Sec. 22 provides that such appeals shall be taken in the same time and in a similar manner, with appeals to the court of appeals. It has been frequently held by this court that, on appeals from the county court to the circuit court under these sections, the jurisdiction of the circuit court is purely appellate, and that

it can pass only upon such matters of fact as are certified from the county court. *Helm v. Short*, 7 Bush 623.

On this appeal to the circuit court there is no bill of evidence, but in the judgment of the county court it is recited that upon hearing the evidence, argument of counsel, etc., it is adjudged that the petition be dismissed.

On the appeal to the circuit court the case was heard de novo, and a judgment again rendered dismissing the petition. This the circuit court had no right to do, and if the answer and amended answer in the county court present any defense the circuit court should have simply affirmed the judgment of the county court. It appears to us that the allegations in the amended answer that "the plaintiff does not own nor possess, nor does he have any right to, said quarter of land," and which was controverted of record, presents a substantial issue upon which the county court properly heard evidence, and there being no bill of evidence this court must assume that the evidence heard in the county court was sufficient to support the judgment..

Judgment affirmed.

Crossland & Crossland, for appellant.

William Lindsay, C. L. Randle, for appellees.

JOHN KUHN, ET AL., *v.* HENRY ADAMS, TREASURER, ET AL.

[Abstract Kentucky Law Reporter, Vol. 1—338.]

Note as Payment.

Receiving the debtor's note is not the payment of a debt in the absence of an agreement by the creditor to accept the note as such payment.

APPEAL FROM KENTON CIRCUIT COURT.

October 14, 1880.

OPINION BY JUDGE PRYOR:

We see nothing in this case authorizing a reversal. There never was any contract by the church or its agents to receive the \$500 note as a payment on the note due by Supple. The jury were told that if the note was received as a payment the appellants were entitled to a credit, and Adams states expressly that it was not received in that manner; but the parties were told that he had no au-

thority to accept the note without the consent of the trustees. He took the note and presented it to the trustees, and they wanted the fact inserted in the note that it was not to be credited untid paid, when the note was returned and another executed to be credited the amount when paid. If the jury believed Adams there was never an agreement to accept the note unconditionally as payment, and the verdict is sustained by the evidence on this point.

The fact that the church at one time had in its possession the money of Supple, and could have applied it to the payment of the note, constituted no defense. Myers, to whom the note was payable, was made a co-plaintiff, whether by his consent does not appear. There was no objection to the proceeding except by demurrer, and the petition alleging that it belonged to Adams, as treasurer, who had succeeded Myers, the latter being a coplaintiff, authorized a judgment in favor of Adams, although Myers died before the judgment was rendered. The presumption is that Myers permitted or directed the use of his name, and it is evident that Adams on the face of the petition was entitled to recover.

The appellants borrowed its money, or became the surety of one who did, and we know of no rule of public policy that would prevent its recovery.

The judgment is *affirmed*.

T. F. Hallam, T. J. Phelps, for appellants.

A. C. Ellis, for appellees.

J. T. RAMSEY v. CLARK & MONTGOMERY TPK. CO., ET AL.

[Abstract Kentucky Law Reporter, Vol. 1—308.]

Ignorance as Ground of an Estoppel.

While mere silence or acquiescence when in ignorance of one's rights will not work an estoppel, where one was present and acquiesced in the construction of a turnpike, knowing that the company believed that it was constructing the road on another's land, and asserted no claim of ownership thereof during such construction and for many years thereafter, the legal presumption being that he knew the boundary of his own land, it is incumbent on such a plaintiff to show that he was in ignorance of the fact that the land on which the turnpike was constructed belonged to him.

APPEAL FROM CLARK CIRCUIT COURT.

October 14, 1880.

OPINION BY JUDGE PRYOR:

The defense interposed was properly made. It is alleged that the

appellant was present when the contract of relinquishment was made and delivered to the company, and made no objection to the same, and also acquiesced in the construction, knowing that the company believed that they were constructing the turnpike on Fry's land, and that he asserted no claim of ownership during the entire period of its construction, nor during eight years of travel over it after its completion. The legal presumption is that appellant knew his own land as well as its boundary, and while mere silence or acquiescence when in ignorance of one's rights will not work an estoppel, we are inclined to conclude that upon the defense made it was incumbent on the appellant to show that he was in ignorance of the fact that the land on which the turnpike was constructed belonged to him. The record, in fact, shows that it is not embraced by the boundary contained in his deed, and the effort is made to recover in this case on the ground that the boundary of the land, as found in the conveyance, should be so changed as to give to the appellant the quantity of land purchased by him, thirty-nine acres.

As between the original grantor and the appellant, he may correct this mistake, but when a part of this land has been conveyed to another in ignorance of the mistake committed by the parties, the original grantee must be held to the boundary contained in his conveyance.

If the appellant insists that he had possession of the land at the time, and the conveyance by its boundary embraced the land, then he must, from the facts in this case, be presumed to have known that these parties were building a road on his land under a license from another, and his silence for so long a time will prevent him from asserting any claim.

W. M. Buckner, John B. Houston, for appellant.

French & Tucker, for appellees.

[Cited, *Wright v. Williams*, 25 Ky. L. 1377, 77 S. W. 1128.]

SUSAN THRELKELD *v.* BENJAMIN DU'ERSON'S ADM'R.

[Abstract Kentucky Law Reporter, Vol. 1—339.]

Conversion of Estate.

Where one legatee takes possession of an estate but does not qualify as executor, he is liable, if at all, only for conversion if he fails to account for the interests of other legatees. However, where one who takes possession of such an estate and promises another legatee that he will pay her the value of her interest, such a promise may be enforced.

Stale Claim.

A claim by one legatee under a will against another legatee, who took possession of the estate, not as executor, and the whole estate amounts to no more than \$150, which was all expended in having tombstones placed over the graves of his mother and father as directed by the will, cannot be maintained, even where the one in possession promised to pay to claimant the value of his interests when the claim is not asserted for more than thirty years after the will is probated.

APPEAL FROM HENRY CIRCUIT COURT.

October 14, 1880.

OPINION BY JUDGE PRYOR:

It is alleged by the appellant, Mrs. Threlkeld, that her grandmother, Mary Duerson, died in the year 1841, leaving a last will by which she devised her estate to her two sons, Thomas and Benjamin Duerson, and to America Duerson and the plaintiff, Mrs. Threlkeld; that this will was probated in that year, 1841, and Benjamin Duerson qualified or acted as the executor and failed to account for the estate that came to his hands; that he made no inventory of the estate, but converted it to his own use; and that he often promised to pay her the value of that part of the estate to which she was entitled, and made these promises within a short time before his death that occurred shortly before the institution of this suit against his administrator.

This action was not instituted until the year, 1875, more than thirty-four years after the probate of the will and after the death of the party whose estate is now attempted to be made liable. Benjamin Duerson never, in fact, qualified as the executor of the will of his mother, and he is liable, or his estate, if liable at all, on the idea that he converted the property to his own use, and promised to account to the appellant for the value of her interest. Such a promise could, no doubt, be enforced if it appeared that a conversion had been made of the estate, and the action had been instituted within the proper period. This is certainly a stale claim, if it has any foundation in fact, and any court would be reluctant to render a judgment, upon proof of a parol promise to pay after the lapse of so many years from the date of the original liability; but in this case the lapse of time not only evidences the weakness of appellant's claim, but the weight of the testimony conduces to show that Mrs. Duerson had but little, if any, estate to devise. The commissioner, in a report as to the estate

left by the widow, shows clearly that her interest in the land and negroes was only a life estate, or at least that this property was divided between the heirs. She left no estate except household furniture and some stock. This property did not exceed in value \$150, and was expended by the decedent, Benjamin Duerson, in having tombstones placed over the graves of his mother and father, as directed by the will.

Benjamin Duerson was a thrifty, prosperous farmer, prompt in all of his engagements, and while there is proof conducing to show that he had made promises to pay the appellant, we cannot regard it as sufficient to revive a liability that originated thirty-four years prior to the assertion by an action at law or in equity to recover the alleged demand. Besides, this is only an action at law, although filed in equity, to recover upon a promise alleged to have been made upon a sufficient consideration. The court below has passed on the facts and we cannot disturb the finding. He cannot be said to have held the property as trustee or in a fiducial capacity, as he never qualified as executor; and if his action as such makes him a trustee, it is too late, after thirty-four years, to give vitality to such an original undertaking, and particularly when it was doubtful as to the existence of the original liability.

Judgment *affirmed*.

J. & J. W. Rodman, for appellant.

Caldwell & Harwood, for appellee.

B. F. VEST *v.* B. W. NORMAN, ET AL.

[Abstract Kentucky Law Reporter, Vol. 1—317.]

Anger no Excuse for Slander.

It is no defense in a slander suit for the defendant to show that he was angry when he spoke the words charged.

Motion for New Trial.

An assignment of error that "The court erred in overruling the defendant's motion for a new trial" is not sufficient to raise any question in the Court of Appeals.

APPEAL FROM GALLATIN CIRCUIT COURT.

October 14, 1880.

OPINION BY JUDGE COFER:

There was no error in allowing the amended petition to be filed. This court reversed the former judgment because the petition was defective, and the right to amend was the same as it would have been if the court below had granted a new trial on the same ground upon which the judgment was reversed. Nor is it material that the court did not formally grant a new trial after the mandate was filed. It is usual and more regular to do so, but it is not essential; the judgment was already set aside by the reversal of this court. Nor was it necessary that a copy of the opinion be filed before proceeding under the mandate. It is not material now whether the circuit court ever saw the opinion or heard it read. The sole question is whether it has ruled the law correctly upon those points embraced by the assignment of error.

The pleading filed by the appellees after the return of this cause purported to be an amended petition. It charged the same language that was charged in the original, and merely repeated the substance of that pleading, and added the allegation for the omission of which the original was held bad. The plea of the statute should, therefore, have alleged that the words were spoken more than one year before the filing of the petition, and not that they were spoken more than one year before the amendment, which merely perfected the cause of action attempted to be set up in the original.

The third paragraph presented neither a defense nor matter of mitigation. The substance of it was that Mrs. Norman had prevailed upon his wife in his absence to give her a book; that she refused to return it, and in consequence he became very angry and said some unbecoming things to her, one of which was that she was a "damned bitch"; that he did not mean to impeach her character, but was led into the use of this most unbecoming and, as he admits, untruthful language by his great anger. We are not aware that anger is any excuse for slander, or that it is, in contemplation of law, even a mitigating circumstance, however a jury might choose to regard it.

The amended answer offered was a mere repetition of the attempt contained in the second paragraph of the answer to the amended petition to plead the statute of limitations. This disposes of all the errors assigned except the fourth, which reads as follows: "The court erred in overruling the defendant's motion for a new trial." This is not sufficient to raise any question in this court. The rule

amended in *Maxwell v. Dudley*, 13 Bush 403, applies in all its force to this case.

Judgment affirmed.

W. B. & H. M. Winslow, A. J. James, for appellant.

J. J. Landrum, for appellees.

[Cited, *Hillerich v. Franklin Ins. Co.*, 111 Ky. 255, 23 Ky. L. 631.]

ROBERT QUISSENBERRY v. BETTIE D. HUNT, ET AL.

[Abstract Kentucky Law Reporter, Vol. 1—341.]

Wills—Construction of Will.

Where one devises his estate to his widow to enable her to raise and educate her children, and provides that she shall have and control such property so long as she remains his widow, and in case of her marriage the real estate to be divided between his widow and children according to the law, the children during the widowhood of their mother have no legal claim to the proceeds of such estate.

APPEAL FROM CLARK COURT OF COMMON PLEAS.

October 15, 1880.

OPINION BY JUDGE PRYOR:

The estate of the deviser was devised to his widow to enable her to raise and educate her children, and for that purpose she has the sole and absolute control of it during her widowhood; and to avoid any wrong construction of the language of the will on this subject the testator provides: "I intend that my beloved wife aforesaid shall manage and control both my estate herein and my children, so long as she remains my widow. And in the event of her marriage then the real estate, etc., to be divided between his wife and children according to law." The control and disposition of the estate is left entirely to the discretion of the widow, to prevent the annoyance to her of claims on the part of the children to a distribution of the estate or its proceeds during her widowhood. Confiding in the judgment of his wife and her affection for the children the testator has placed his wife in the same position he occupied, when living, and the children, so long as she remains a widow, have no legal claim to the proceeds of this estate, but the children are the objects of her bounty.

Judgment affirmed.

G. B. Nelson, Haggard & Jones, for appellant.

T. S. Tucker, for appellees.

E. CUMMINGS v. J. T. APPLGATE, ET AL.

[Abstract Kentucky Law Reporter, Vol. 1—351.]

Principal and Surety.

Where the holder of the prior lien was the surety of the purchaser at the sale of the real estate, it was as much his duty as it was the principal's to pay the purchase money, and both being before the court and failing to comply with their covenant, the chancellor had the power and it was proper for him to direct a sale to pay the debt.

APPEAL FROM PENDLETON CIRCUIT COURT.

October 15, 1880.

OPINION BY JUDGE PRYOR:

Chalfont, the holder of the prior lien, was the surety of Applegate, the purchaser, at the first decretal sale. It was as much his duty as Applegate's to pay the purchase money, and both being before the court by the rule, and failing to comply with their covenant, the chancellor had the power, and not only so, but it was proper, to direct a sale to pay the Rodman debt, and the fact that the surety had taken the benefit of the bankrupt law can make no difference. The proceeds of the last sale should have been applied to Rodman's lien, and the relation then existing between the purchaser, Applegate, and his surety or the assignee of the latter in regard to this land is not a question before the court.

Judgment affirmed.

J. W. Bryan, for appellant.

L. T. Applegate, Clark & Simon, for appellees.

ANNIE ROSS v. MECHANICS' MUT. SAV. ASS'N OF NEWPORT.

[Abstract Kentucky Law Reporter, Vol. 1—352.]

Description of Real Estate in a Mortgage.

Where real estate is properly described in a mortgage, the mortgage is not void because it does not describe the real estate as being in a named county. The action to enforce the mortgage is local, and the petition alleges that the real estate is in such named county. This is sufficient.

APPEAL FROM CAMPBELL CIRCUIT COURT.

October 15, 1880.

OPINION BY JUDGE PRYOR:

The mortgage was executed to secure the debt due the appellee, and there is no reason, if unpaid, why the appellee should not be allowed to foreclose the mortgage. A more minute and specific description of the property mortgaged could not well have been given, and it is a novel suggestion that because the writing does not describe the real estate as being in Campbell county it is therefore void. The action to enforce the mortgage is local, and the petition alleges that the real estate is in Campbell county. That fact is undenied.

Judgment *affirmed*.

J. R. Hallam, for appellant.

O. W. Root, E. W. Hawkins, for appellee.

A. D. BOYD *v.* J. B. MORRIS.

[Abstract Kentucky Law Reporter, Vol. 1—349.]

Objections and Exceptions.

No contention can be maintained in the Court of Appeals as to the competency of evidence where no objection to it is shown by the record to have been made in the trial court.

Instructions.

No reversal can be had on an instruction, even if erroneous, where the same language is used in other instructions given at the trial and not objected to.

APPEAL FROM HART CIRCUIT COURT.

October 15, 1880.

OPINION BY JUDGE COFER:

The verdict is not so flagrantly against the evidence, nor is the finding so excessive, as to warrant this court in reversing on either of these grounds.

We do not see in what way the appellant was prejudiced by the refusal of the court to require the appellee to answer as to whether he made certain statements to Richard Boyd and others. The utmost effect of those statements would be to prove that the appellee entertained unfriendly feelings toward the appellant, and thus to furnish ground for discrediting his statements before the jury. That he was unfriendly with the appellant was admitted in his testimony, and the

state of his feelings would not have been better shown by his admission or by proof that he made the statements inquired about.

We incline to the opinion that the testimony of Dr. Walton was competent, but whether it was or not it was not objected to, nor does the court appear to have passed upon the question whether it was competent or not. All the record shows is that the defendant then excepted and still excepts. This is not sufficient. *Loving v. Warren County*, 14 Bush 316.

The bill of exceptions shows that instruction No. 2 was not objected to by either party. No valid objection to instruction No. 1 is perceived. If it be objectionable in the particulars indicated in the briefs, still no reversal could be had on that ground, because the same language is employed in other instructions not objected to. Instruction No. 7 would have been wholly abstract under the issue and facts in the case. The evidence in regard to another person and a shot gun being seen near by about the time of the difficulty was neither objected to nor excepted.

Judgment affirmed.

S. M. Peyton, Wm. Lindsay, for appellant.

H. C. Martin, Jas. A. Dawson, for appellee.

L. H. BELL v. GREAT AMERICAN FIRE EXTINGUISHER CO.

[Abstract Kentucky Law Reporter, Vol. 1—342.]

Breach of Contract.

Where a contract is to divide the proceeds of sales of personalty, until the defendant is shown to have received proceeds on account of sales made by the plaintiff there is nothing to divide, and no breach of the contract is shown.

APPEAL FROM LOUISVILLE CHANCERY COURT.

October 15, 1880.

OPINION BY JUDGE COFER:

The petition sets out the agreement almost in the words of the written memorial. The contract is awkwardly worded, but the substance and legal effect of it is that the appellant was to receive one-half the proceeds of all sales made through the influence of the paper or its publisher or editor until he should receive \$175. It is alleged that the advertisement was published by the appellant, who is the

publisher of the paper, for one year, and that he caused sales of the extinguisher to the amount of more than \$350 to be made. Of course, it is to be understood, although the writing does not say so, that the sales referred to were to be made by or for account of appellee; but it is not alleged that the sales which the appellant caused to be made were made for it, or that it received the benefit of such sales. For aught that appears the sales referred to of the extinguishers may have been for some one else, or if the sales are to be taken to have been made for the appellee, then it is not alleged that the price for which they were made, or any part of it, has been collected or received by it.

The obligation is to divide the proceeds of the sales, and until the appellee receives something for sales caused by the appellant there is nothing to divide, and no breach of its contract.

Wherefore the judgment must be *affirmed*.

D. M. Rodman, for appellant. A. Barnett, for appellee.

J. G. BURTON v. G. C. WHARTON.

[Abstract Kentucky Law Reporter, Vol. 1—341.]

Slander—Words Charged.

Words spoken of another not importing criminality are not per se actionable, and their meaning cannot be enlarged by alleging that the person speaking them intended to charge more than the words on their face import.

Motives of the Trial Judge.

The motives or influences which operate upon the mind of the trial judge in making a decision cannot be inquired into in a suit between private parties, in which the judgment is in no manner involved.

APPEAL FROM JEFFERSON COURT OF COMMON PLEAS.

October 15, 1880.

OPINION BY JUDGE COFER:

The words charged are not per se actionable. They do not import criminality, and their meaning cannot be enlarged by alleging that the person speaking them intended to charge more than the words on their face import. *Brown v. Piner*, 6 Bush 518.

That the judge was influenced, by the words charged to have been spoken, to inflict upon the appellant greater or more ignominious

punishment than he would otherwise have inflicted, presents an issue which public policy forbids that the appellant should be permitted to make. The motives or influences which operate upon the mind of a judge in rendering a decision cannot be inquired into in a suit between private parties in which the judgment is in no way involved. To permit such a practice would place it in the power of private persons, whenever they chose to do so, by real or feigned issues, to institute an inquiry into the influences which operated to produce any decision that may be made. The government alone has power to institute and prosecute such proceedings.

Judgment affirmed.

Isaac H. Trabue, W. C. Whittaker, for appellant.

Russell & Helm, for appellee.

HIRAM FERGUSON'S ADM'R v. JOHN L. KOUNS.

[Abstract Kentucky Law Reporter, Vol. 1—338.]

Instructions.

In a suit on an account it is error for the court to charge the jury that "If the jury believe from the evidence that after rendering of the services charged in the first two items of the account Dr. Ferguson and defendant had a settlement, and that upon such settlement Ferguson fell in debt to defendant, then the presumption of the law is that these items were embraced in such settlement," for such a presumption is not conclusive, and the fact should have been left for the jury to consider and to determine whether such items were so embraced.

APPEAL FROM BOYD CIRCUIT COURT.

October 16, 1880.

OPINION BY JUDGE HINES:

The following instruction should not have been given:

"If the jury believe from the evidence that after rendering of the services charged in the first two items of the account Dr. Ferguson and defendant had a settlement, and that upon such settlement Ferguson fell in debt to defendant, then the presumption of the law is that these items were embraced in such settlement."

From the fact of a settlement the jury might have inferred that the items mentioned were embraced in the account, but the presumption that they were so embraced is by no means conclusive. Instead

of leaving the fact for the consideration of the jury and permitting them to give it such weight as they might deem it entitled to, they were in effect told that if they found that the settlement was made they must then find that these items were embraced in it. *Lawhorn v. Carter*, 11 Bush 7.

Judgment *reversed* and cause remanded.

L. T. Moore, for appellant.

LEWIS LENTZ *v.* ELIZABETH PARK'S ADM'R.

[Abstract Kentucky Law Reporter, Vol. 1—317.]

Allegations of Petition.

A petition against an administrator for wrongfully placing credits on notes in his possession is insufficient where it is not alleged that the credits were placed on the notes by the defendant, but merely sets up a state of facts in which such a wrong might have been perpetrated.

APPEAL FROM LOUISVILLE CHANCERY COURT.

October 16, 1880.

OPINION BY JUDGE PRYOR:

The amended petition filed by the administrator presents no cause of action against the appellant, and shows no reason for erasing or refusing to allow the credits endorsed on the note. It is an argumentative pleading attempting to convince the chancellor that the administrator might have been in error in allowing the credits by the statements of the original petition. He does not allege that the credits were placed on the notes by the appellant, but shows a state of case in which such a wrong might have been perpetrated on his intestate. The administrator, when he took the notes, found the credits endorsed, and having admitted them to be proper, he must allege something else than that he might have done injustice to the estate by the admission before he can ask the court to disregard them. As this is purely a legal issue, although tried by the chancellor, we are not disposed to pass upon the questions of fact raised as to the other payments.

The judgment is *reversed* and a new trial awarded the appellant.

Lyman L. Parks, for appellant.

L. A. Wood, J. L. Clemmons, for appellee.

ANDREW BENTLE v. JOHN GRAVES.

[Abstract Kentucky Law Reporter, Vol. 1—338.]

Eviction as Defense to Suit for Purchase Money.

Where a purchaser is forced to yield to a paramount title, even though he does so without a suit being brought against him, he has a good defense against a suit brought on a note executed by him for the purchase money of such land.

APPEAL FROM PENDLETON CHANCERY COURT.

October 16, 1880.

OPINION BY JUDGE PRYOR:

It is certain from the testimony in this case that at the time the four acres of land were allotted to the appellant they were in the actual possession of Ford's heirs, and this fact was known to the appellant; but whether he knew this fact or not is immaterial to the present controversy. He had no right to enter upon and oust the joint tenants then in the possession, so as to prevent partition, or to take from them the right to their respective interest when the division took place.

The appellant, however, nor his vendees, were never in the possession, unless the fact of the execution of the deed gave them possession. The land was not enclosed by them, except perhaps a small strip upon which a part of the fence stood; nor does it appear that the fence was built by either the appellant or his vendees. The land was surrendered to the appellant without an action against him; still, he has shown that he yielded to a paramount title, and the judgment below refusing to render a judgment for the note was proper, and is *affirmed*.

C. H. Lee, for appellant. J. W. Edwards, for appellee.

E. J. SANDERS v. W. H. YOUNG, ET AL.

[Abstract Kentucky Law Reporter, Vol. 1—334.]

Liability on Surety on Constable's Bond.

Where a surety admits the execution of an official bond for a constable, and the mere omission of an initial or the insertion of the letter "M" as the middle name, when it should have been the letter "H", does not invalidate the bond.

APPEAL FROM BARREN CIRCUIT COURT.

October 19, 1880.

OPINION BY JUDGE PRYOR:

The answer filed by the defendants presents no defense to the action. It is not denied that the defendants executed the bond as the sureties of Young, the constable; but on the contrary it is virtually admitted. It is not pretended that J. H. Payne, the surety defending, did not execute the paper; but the clerk having recited in his order that the constable had qualified with Seth Kinchelve and James M. Payne, his sureties, the defense is that the record failed to show that Seth Kinchelve and J. H. Payne were accepted as the sureties. That J. H. Payne is the party described as J. M. Payne there can be no doubt, and the question as to whether the defendant, Payne, was the real party signing the bond should have been submitted to the jury, if any such submission was necessary to fix his liability. It was not necessary to allege either fraud or mistake, when there is no denial that the defendants are the persons signing the bond as sureties, and the mere omission of an initial, or the insertion of the letter "M" as the middle name, when it should have been the letter "H", does not invalidate the bond.

Judgment *reversed* and cause remanded for further proceedings.

Lewis & Porter, for appellant.

L. McQuown, William Dickinson, for appellees.

WILLIAM SETTLE *v.* W. T. GRAY, ET AL.

[Abstract Kentucky Law Reporter, Vol. 1—334.]

Bond or Deed Held by Settler.

Under the Act of 1835, where an actual settler upon land holds a deed or bond for title, a patent issued to another is void and does not authorize a recovery by the patentee, although the party in possession may not be able to trace his title back to the commonwealth.

APPEAL FROM DAVIESS CIRCUIT COURT.

October 19, 1880.

OPINION BY JUDGE PRYOR:

As to the possession of the thirty-one acres of land in dispute it seems that the proof is equally balanced, and the patent issued to

Settle in the year 1837 will enable him to recover unless the appellees have shown an elder patent, or had acquired title, other than the mere possession, prior to the entry and patent by Settle. There is much testimony showing that the entry by Settle was within the patent to Claypool, and if not it does not appear that the ancestor of the appellees held a title bond for the land at the time the appellant obtained his patent. Under the act of 1835, where an actual settler upon the land holds a deed or bond for title, a patent issued to another is void, and will not authorize a recovery by the patentee, although the party in possession may not be able to trace his title back to the commonwealth. While the proof as to the existence of the bond is not altogether satisfactory, we are inclined to think that such a paper was executed, and that the ancestor of the appellees was in possession before the entry by the appellant is, we think, established, and therefore the judgment against the appellant was proper and is affirmed.

Leslie & Botts, for appellant. Lewis & Porter, for appellees.

THOMAS S. SMITH v. WILLIAM TIEMAN, JR.

[Abstract Kentucky Law Reporter, Vol. 1—333.]

Principal and Agent.

The authority of an agent to sell and collect does not empower him to receive as payment a discharge from his own indebtedness.

APPEAL FROM CAMPBELL CHANCERY COURT.

October 19, 1880.

OPINION BY JUDGE PRYOR:

The difficulty in sustaining the judgment below arises from the manner in which it is alleged this purchase money note was discharged or paid by the appellee. That Davidson was the agent to sell was clearly shown; but that he had the right to receive, in payment for the notes, a discharge of his own liabilities is not authorized from any testimony in the case.

It is shown here that the agent who sold the property was indebted to the appellee for goods or groceries, and agreed that these groceries should be settled for in that manner. There is no proof showing any such authority. The authority to sell and collect does not empower the agent to receive as payment a discharge from his own in-

debtedness, and in the absence of such a special authority such a payment must be disregarded.

The judgment is, therefore, *reversed* and cause remanded with directions to enforce the lien.

A. D. Smalley, for appellant. John S. Ducker, for appellee.

[Cited, *Woodruff v. Americian Road Mach. Co.*, 23 Ky. L. 1551, 65 S. W. 600.]

WILLIAM EVANS, ET AL., v. A. B. CREAL, ADM'R, ET AL.

[Abstract Kentucky Law Reporter, Vol. 1—334, as *Evan v. Creal*.]

Rights of a Co-Tenant.

A co-tenant has no right to charge his co-tenants with improvements made by him, certainly not when the barn erected by him on the land had been destroyed by fire at the time an accounting and judgment settling the rights of the parties was rendered.

APPEAL FROM LARUE CIRCUIT COURT.

October 19, 1880.

OPINION BY JUDGE COFER:

The judgment setting aside Creal's purchase established the fact that, as against the appellants, he had no title to their interests outside of the dower allotted to the widow. He was a cotenant with them, and as such had no right to charge them with improvements, certainly not unless the improvements remained on the land when the judgment settling the rights of the parties was rendered. The evidence shows that the barn built by him has been burned down, and that the farm is not in any better condition now than when he took possession. Therefore he ought to account for use and occupation for as much as a tenant could have afforded to pay for rent, the tenant keeping up the repairs.

Taking all the evidence together, we think that part of the land outside of the dower was fairly worth \$30 a year, the tenant to keep up the repairs, and that Creal should be charged with that sum, and should be credited by the money paid for taxes on the land outside of the dower, that is, with two-thirds of the taxes on the whole land. As owner of the dower he was bound to pay the taxes on it.

The court did not adjudge to Creal's and Nall's attorneys a lien on appellants' interest, and they have no right to complain that a lien was given the attorneys on the rest due.

Wherefore the judgment is *reversed*, and the cause remanded for a judgment in conformity with this opinion.

W. H. Chelf, S. H. Bush, H. S. Johnson, for appellants.

T. A. Robertson, Read & Twyman, for appellees.

L. H. CORBIN v. W. B. OLDHAM'S ADM'X.

[Abstract Kentucky Law Reporter, Vol. 1—327.]

Petition on Promissory Note.

A plaintiff who sues on a promissory note must aver that the defendant undertook, agreed or promised to do that which he is sued for failing to perform, or facts must be alleged from which the law will imply a promise, which cannot be done when the averment is that the defendant executed his note to the plaintiff of a given date for a given amount, payable at a certain time.

Exhibit With Petition.

The petition on a promissory note must contain within its own body, and not merely by reference to another paper or exhibit, a statement of the facts constituting the cause of action. To aver in such a petition that defendant executed his note to plaintiff, without averring a promise to pay, is but pleading a conclusion and not a fact.

APPEAL FROM HENRY CIRCUIT COURT.

October 19, 1880.

OPINION BY JUDGE COFER:

The petition in this case comes clearly within the rule laid down in *Huffaker v. Nat. Bank of Monticello*, 12 Bush 287. That case announced no new rule. In *Hill v. Barrett*, 14 B. Mon. 83, this court, per Judge Marshall, announced the rule that, under the code, "The petition must contain within its own body, and not merely by reference to another paper, a statement of the facts constituting the cause of action." This conclusion was announced after an elaborate discussion of the sections of the code bearing upon the subject, and has generally been followed since that time. The objection to the petition in *Burton v. White's Adm'r*, 1 Bush 9, was that it did not state specifically when the note fell due. It is said in the opinion that "in describing" the note the petition failed to state specifically when it became due. From this we infer that the date of the note was given, and that it was stated in the petition that it was payable six months

after date, and the objection to it was that it did not also state when the note became due, i. e., when six months from a given date would expire. This was mere matter of calculation from the date given on the face of the petition, and was therefore certain because capable of being made certain without looking beyond the four corners of the petition.

Some expressions contained in the opinion seemed to support the views of counsel, but when this language is read in the light of the opinion in *Dodd v. King*, 1 Met. 430, which was then being considered, much of the difficulty suggested by a cursory reading of the opinion in *Burton v. White* is removed. In *Dodd v. King* the plaintiff declared upon notes payable to himself, but filed a note payable to another, and it was held a fatal variance. In *Burton v. White's Adm'r*, *Dodd v. King* was cited, and relied upon to show that there was a variance, and in distinguishing the cases the court said, "Here the omission to allege when the note was payable was supplied by the note itself, as effectually as if it had been literally copied by the petition as a portion of its allegations; and therefore there is no variance and no occasion for proof extraneous or without allegation."

The only objection taken to the petition in *Totten v. Cooke*, 2 Met. 275, seems to have been that the date of the note was not given; but the time when it was payable was stated, and this was held sufficient. Whether the petition contained a statement of a promise or understanding to pay does not appear, and it is hardly probable that so nice an objection as that which was argued would have been relied upon; and one so obvious and so certainly fatal, under the old system of pleading, would have been overlooked by either court or counsel. The code was certainly intended to liberalize, but it was as certainly not intended to destroy the substance of pleading. That the defendant undertook, agreed or promised to do that which he is sued for failing to perform, is the very gist of an action for failing to perform a contract; and as long as the necessity to state the facts constituting the plaintiff's cause of action remains, such undertaking, agreement or promise must be alleged in every action for failing to perform a contract, or facts must be alleged from which the law will imply a promise, which cannot be done when the allegation is simply that the defendant executed his note to the plaintiff of a given date for a given amount, payable at a specified time.

Wherefore the judgment is *reversed* and the cause remanded for further proper proceedings.

Corroll & Barbour, for appellant.

Frank Matthews, W. B. Moody, for appellee.

AUGUST HEIMERDINGER v. UNITED CIRCLE, DAUGHTERS OF REBECCA.

MICHAEL BUSCH v. SAME.

[Abstract Kentucky Law Reporter, Vol. 1—332.]

Power of Corporation to Loan Money.

A corporation like the United Circle Daughters of Rebecca, having the right to deal in stocks, bonds and mortgages by way of investment, has the right to loan its money and take notes secured by personal endorsement, and such notes are binding upon those who execute such notes.

APPEALS FROM JEFFERSON COURT OF COMMON PLEAS.

October 20, 1880.

OPINION BY JUDGE PRYOR:

It is admitted by the pleadings that the appellants obtained the money by loan from the appellee, and that no part of it has been paid by either the principals or their sureties. The defense is based on the ground that the corporation had no power to loan money.

The corporation has the right to deal in stocks, bonds and mortgages for the purpose of securing their money by way of investment, and with the right to take a mortgage security and to buy bonds. A liberal and proper construction of the act ought not to defeat the recovery when they have invested their money in a loan by note to these appellants and their sureties. At common law a bond was an obligation in writing, under seal, binding the party and his heirs to pay a certain sum of money, or binding the party without naming the heirs; and while the heirs would not be bound at common law in the latter case, still, the writing is a bond, and we see no reason why this writing in this case should be held void, when the instrument was made in good faith and by a corporation authorized to make investments on mere personal obligations. No such defense should be allowed.

Judgment affirmed.

S. Harney, for appellants. William Reinecke, for appellee.

LOUISVILLE TPK. CO. *v.* WILLIAM A. SHADBURNE, ET AL.

[Abstract Kentucky Law Reporter, Vol. 1—325.]

Construction of Contract.

The court in construing the terms of a contract will adopt the construction placed thereon by the parties for a long period of time after its execution. A contract acquiesced in by the owner of a stone quarry by her permitting a turnpike company to take stone out of it for a period of forty years, and by paying for such stone so taken out, the turnpike company construes such contract as not entitling it to take the stone without paying for it.

APPEAL FROM LOUISVILLE CHANCERY COURT.

October 20, 1880.

OPINION BY JUDGE COFER:

Whatever might, under other circumstances, have been a proper construction of the writings of 1832 and 1833, we incline to the opinion that the conduct of the parties has given them a construction that supersedes the necessity of any construction by the courts.

It is proved by one witness that the company has for a great while taken stone from one of the quarries, at pleasure, and that it was never permitted to take stone from the other. The quarry it was permitted to use is spoken of as designated on a map in the case as number two. There is nothing in the record to contradict that statement.

Not only was the right to use quarry number two thus asserted on one side and admitted on the other, but Mrs. Wright, who owned the land and under whom the appellees hold as volunteers, recognized the right in the company as late as 1874, just before she made partition of the land. G. C. Shadburne wrote in the letter signed by Mr. Barrett as follows:

"In laying off the lot which embraces the stone quarry that you make such allowances as are equitable growing out of the contract with the turnpike company made by Mr. Geo. Doup in relation to the use of stone." Mr. Shadburne says that the paper contained his mother's (Mrs. Wright's) views; that it was drawn after her ideas in the matter, as he never would have written the paper at his own instance. This proves that she recognized the contract as then subsisting, and wished the fact to be considered in making the contemplated division so that the child, to which the lot embracing the

quarry should be allotted, should have an equivalent for the incumbrance resting upon it on account of the rights of the turnpike company. That she was then a married woman does not affect the force of her recognition of the contract.

Nor does the fact that the company paid for the stone taken show either that it never had a right under the contract to take it, or that it had abandoned the right. The parties have again saved the court the task of construing the writing. By permitting the company to enter at pleasure and take stone, and by the recognition of the contract by Mrs. Wright in 1874, forty-one years after it was made, the right to the stone is established, and by paying for the stone taken the company has construed the contract as not entitling it to take the stone without paying for it.

That the road heretofore used to get from the turnpike runs over a lot on which there is no quarry does not affect the right of the company to a way over it. The right to take the stone necessarily implies a right to pass over any land then belonging to George Doup which lies between the turnpike and the quarry, and the person now holding the land under Mrs. Wright took it subject to that easement.

It does not appear that any route to the quarry has been designated by agreement between the parties, or that any has been so long or constantly used as to entitle the company to approach the quarry by any particular route; and unless they agree on a route it will be competent for the chancellor to designate it, having due regard to the rights and convenience of the parties respectively.

Neither lapse of time nor the statute of limitations is available as a defense. The easement was continuously enjoyed up to the death of Mrs. Wright, and is no more affected by the lapse of time than if the contract had been made at the date at which the right to enjoy the easement was first denied.

Judgment *reversed* and cause remanded for a judgment in conformity to this opinion, and for such further proceedings, if any, as may be necessary to settle the rights of the parties according to the principles herein announced.

James Speed, Thomas Speed, for appellant.

L. McQuown, Elliott & Atchison, for appellees.

[Cited, *Kamer v. Bryant*, 103 Ky. 723, 20 Ky. L. 340, 46 S. W. 14.]

CHARLES MORNAN *v.* JAMES H. WINSTON.

[Abstract Kentucky Law Reporter, Vol. 1—330.]

Distress Warrant for Rent.

The landlord may have a distress warrant for rent due him, and the fact that the tenant holds a valid claim for work and labor done for the landlord prior to the landlord's beginning his suit will not preclude him from recovering the amount due for rent when the tenant fails to plead the claim due him by way of set-off.

Set-Off or Independent Action.

A tenant against whom a distress warrant is issued for rent, who holds a claim against the landlord not growing out of or connected with the rent, may plead his claim as a set-off. In a separate action by the tenant against the landlord for seizing his property under a distress warrant and sacrificing it in an effort to collect, the landlord is a competent witness to establish the amount of rent due, and it is error to exclude his testimony.

APPEAL FROM CAMPBELL CIRCUIT COURT.

October 20, 1880.

OPINION BY JUDGE PRYOR:

On the 2d of August, 1875, the appellant sued out a distress warrant against the appellee, Winston, for \$40.25, amount of rent alleged to be due. The personal property of the appellee was sold, and as he alleges sacrificed, in the effort on the part of the appellant to make his alleged claim. The appellant knew he was not indebted to him in a sum exceeding twenty dollars, and with this knowledge had his property wrongfully seized and sold for twice that amount. During the progress of the trial the appellant (the landlord) offered himself as a witness for the purpose of establishing the amount of rent due, and his testimony was excluded on the ground that on the 5th of August, two days after the issuing of the distress warrant, the tenant had instituted an action against the landlord on an account for work, labor and material furnished the latter by the tenant, and asking a judgment for a much larger amount than the claim for rent. On the trial of that case there was a judgment for the tenant, and the account made the basis of that action antedating the day on which the distress warrant was issued, the court held that no claim for rent existed, or that the landlord was in no danger of losing his rent.

This is not an attachment, but the ordinary mode of recovering

rent on the failure of the tenant to pay. While the tenant might have defeated the recovery by pleading the claim due him as a set-off he was not compelled to make such a defense, and having resorted to his action at law, we see nothing to prevent the landlord from instituting proceedings for the recovery of the rent. The several liabilities had no connection the one with the other, and the fact of the indebtedness by the landlord, growing out of a transaction having no connection whatever with the demand for rent, did not preclude the latter from recovering the amount due for the rent. Suppose the tenant held a mortgage executed by the landlord to secure the tenant's claim on the idea that the land was leased to the tenant; this would not operate as a bar to the recovery of the rent due, or prevent its collection unless pleaded by way of set-off. It is not contended that the materials furnished by the tenant was in discharge of the rent by any agreement of the parties, express or implied, but as there were mutual subsisting claims at the time the rent became due or the distress warrant issued, the landlord is without remedy. The indebtedness by the landlord to the tenant shed no light on the issue raised in the action of tort for the alleged wrongful seizure and sale of the tenant's property, and therefore the appellant should have been allowed to prove whether the rent had been paid.

The instruction that the appellee was entitled to double damages, etc., was erroneous. This is no proceeding under the statute.

Judgment *reversed* and cause remanded for further proceedings consistent with this opinion.

E. W. Hawkins, for appellant. Barry & Hounshell, for appellee.

[Cited, *Kamer v. Bryant*, 103 Ky. 723, 20 Ky. L. 340, 46 S. W. 14.]

JOHN CLINE v. JOHN N. FALLIS, ET AL.

[Abstract Kentucky Law Reporter, Vol. 1—325.]

Weighing Evidence in Case of Conflict.

In case of irreconcilable conflict in the evidence of the parties to an absolute deed claimed to have been a mortgage, the court will take as true the party's evidence which is consistent with the motives that ordinarily control the action of persons alive to their own interests, and will hold as false the party's evidence showing a course pursued which is inconsistent with the motives ordinarily controlling the action of parties to a business transaction.

APPEAL FROM CAMPBELL CHANCERY COURT.

October 20, 1880.

OPINION BY JUDGE COFER:

The sole question in this case is whether there was such an agreement between the appellant and the appellees that they occupy the relation of mortgagee and mortgagors. Upon the face of the deeds and lease the appellant appears to be the absolute owner of the property, and the appellees to have been conditional purchasers. But the appellees claim to have shown that the relation of mortgagors and mortgagee existed.

Fallis testifies that he went to see Cline on the 4th of December, 1872, and that Cline agreed to furnish him the money to pay Timberlake if he (Fallis) would have his wife join in making or consenting to the master commissioner making a deed to the property, with the express understanding that Fallis should have the privilege of redeeming the property at any time as expressed in the lease of the 5th of December.

Cline says no such interview ever took place, and says, moreover, that he never saw Fallis until the next day when he was introduced to him in Smalley's office, and Smalley testifies that he introduced Fallis to Cline at the former's request. Cline also says he never had any agreement with Fallis and wife. When asked how he came to make the lease he answered that Smalley, who was acting for Fallis and wife, made the proposition to him to give a lease to them, which he agreed to do, and the terms were satisfactory, and that the reason he gave the lease was that they offered him a good rent. But he nowhere states how he came to give them the privilege of purchasing as expressed in the lease, and as he disclaims having made any agreement at all with Fallis and wife the inference from his statement is that he agreed with Smalley to make the lease, and that he also agreed with him in regard to the privilege to purchase, though he does not in terms say so.

Smalley, when questioned on this subject, says Fallis called upon him before the contract with Timberlake was completed, and desired, in case Cline took the property, that some arrangement be made with him by which they (Fallis and wife) could occupy the house for an agreed rent; that he made inquiry of Cline, who said he was willing they should have it if they could agree on the rent to be paid; that the next he knew of the matter of rent Hawkins and Fallis showed

him a lease that Hawkins had written, containing the same stipulations as are contained in the lease that was executed; that he showed the lease to Cline, who said if they were willing and desired to rent on the terms stipulated in the lease, they could have it. He also says he copied the lease as written by Hawkins, and the copy made by him we infer was the paper that was finally signed as showing the terms of the lease.

Neither Cline nor Smalley speaks of any negotiations between them concerning the stipulations in regard to the repurchase of the property; nor does Smalley nor any one else speak of a desire on the part of Fallis and wife, or of Cline, that any such stipulations should be inserted. Aside from the testimony of Fallis, there is not a word in the evidence to show how these stipulations came to be inserted. The evidence shows that Cline regarded the property as cheap at the price he was paying Timberlake for it; he says he dealt only with Timberlake, that he had nothing whatever to do with Fallis and wife, and does not attempt to account in any way for the extraordinary manner in which he dealt with them when he came to make the lease.

According to his account and his theory of the case, he was under no obligations to give such terms, and was only renting to them because they agreed to pay a good rent. He was the absolute owner under his purchase from Timberlake of property worth more than he agreed to pay for it, and which he had purchased because it was cheaper; and without any obligation to do so he gives Fallis and wife the option to purchase the property at any time in two years at the price he had paid for it in cash. It also appears, if his theory is right, that Fallis and wife caused a lease to be written embracing the privilege to purchase, and sent it to him without a word of previous negotiation with him upon that subject, and he consented to execute the lease without a word of comment or of subsequent negotiation; for it nowhere appears, except in Fallis' testimony, that one word had passed between Cline and Fallis and wife, or between Cline and Smalley, as their agent, about the purchase until the written lease giving that privilege was presented to him by Smalley. Men do not usually so act without some obligation to do so.

At the time Cline agreed with Timberlake the sale had not been confirmed; nor had it been confirmed prior to the day on which the deed from Fallis and wife to Cline and the lease to them were executed. The property had been sold for one-fourth the original pur-

chase money, and it was natural that they should be seeking some one to make them a loan. The security was ample, and the obligation imposed upon them by the lease was a large interest on the investment, and offered just such an opportunity as one having money to loan would be likely to embrace. Unless Fallis and wife were in some way interested in securing the execution of the contract between Cline and Timberlake, it is difficult to understand why they should put themselves to the trouble to make a deed in order to make sure that Cline should acquire an undoubted title. It is not claimed that they executed the deed in order to secure the privilege of repurchasing. According to Cline's theory he was under no obligation to allow them that privilege. He did that without obligation or motive, and without ever having been asked to do so until the lease containing these stipulations was handed to him by Smalley.

We think the far more reasonable conclusion is that the facts are as stated by Fallis. His statement is consistent with the conduct of the parties, and is under the circumstances the more reasonable. The readiness with which Cline appears, from Smalley's statement, to have assented to the terms of the lease, shows that he had heard of them before. He does not appear to have heard of them previously from Smalley, for neither of them speak of any such terms ever having been discussed between them. If Fallis' statement be true the conduct of all the parties is consistent with the motives that ordinarily control the action of persons alive to their own interests.

Upon the opposite theory the conduct of all the parties is different from what might have been expected under the circumstances. Fallis and wife were not likely to make a deed in which they had no interest, from which they were to derive no benefit, and which they were under no obligation, legal or moral, to make; and on the other hand it is quite as unlikely that Cline would have made the stipulations contained in the lease if, as he claims, he had no dealings with them, and was therefore under no obligation to do so. We, therefore, after a careful examination of all the evidence, conclude that the agreement testified to by Fallis was made, and that he, at least, and Mrs. Fallis' property, or what had been and was her property when the agreement was made, became liable to reimburse the money paid for them to Timberlake, and that the relation of debtor and creditor was thus established, and the deeds and lease were properly held, on the oral evidence, to operate as a mortgage.

The counterclaim set up in the amended petition was not germane

to the original petition, and the order requiring the appellees to elect was proper. Nor was there any error in refusing a credit for the note or due bill of Fallis which is unpaid. The appellees come in to ask the aid of a court of equity, and they must do equity. They cannot ask equity for themselves, and in the same matter ask to have strict law, and doubtful law at that, applied to their adversary.

Judgment affirmed on original and cross-appeal.

F. M. Webster, William Lindsay, for appellant.

J. R. Hallam, for appellees.

P. S. NETHERLAND, ET AL., *v.* ROBERT CALVIN.

[Abstract Kentucky Law Reporter, Vol. 1—326.]

Suit to Set Aside Conveyance.

In a suit to set aside a deed the court may consider the lapse of time intervening between the date of the deed and the beginning of the suit as a circumstance showing to some extent the good faith of the transaction or the lack of good faith.

Recording a Deed.

Where a grantee gives to the deputy clerk his deed for record, and pays to such deputy money sufficient to pay the tax against said real estate and the cost of recording it, and the deed, when found, is in the clerk's office, the neglect of the clerk to endorse upon the deed, when the tax has been actually paid, will not destroy the legal effect of the conveyance, and the grantee may show by evidence that said taxes were paid and not endorsed on the deed.

Dower.

In order to pass title of a married woman, or to make a conveyance evidence against her, under the Act of March 9, 1854, it was required that the clerk before whom she acknowledged the deed should write out and sign the certificate, setting forth therein the facts, including the endorsement made thereon, and record the same within the proper time; and where no certificate is made by the clerk as appears on the face of the deed such a conveyance will not divest her of title.

APPEAL FROM TAYLOR CIRCUIT COURT.

October 21, 1880.

OPINION BY JUDGE PRYOR:

The testimony in this case leaves but little room to question the transactions between the father and son resulting in the execution

of the conveyance under which the appellee claims. The lapse of time intervening between the date of the conveyance and the institution of the present action to set it aside conduces strongly to show that the creditors of the son regarded the conveyance as made in good faith and with no intention to defraud. The appellants were living where every opportunity was afforded them to investigate the questions now raised; and with notice that the title had passed to the father from the son, they have been a long time asserting their rights as creditors on account of the alleged fraudulent transaction. Nearly nine years have elapsed since the deed was made, and the reason assigned by the appellant or some member of the firm for not making the judgment was that a conveyance had been made to the appellee; and when the latter in a deposition, stamped with an honesty of purpose in the detail of the business relations between his son and himself, leaves us no room to doubt the fairness of the transaction, the chancellor acted properly in declining to disturb the deed upon the ground of fraud or want of consideration.

That the deed was acknowledged by the husband and wife is not controverted, or if so, the proof is entirely satisfactory on that point. It is maintained, however, that the deed was never recorded nor lodged for record, and upon this ground, as to creditors, it is claimed, should be disregarded. The deed was recorded on the 14th of March, 1878, and the tax paid about that time, and executed nearly ten years prior to the date of its record. It is shown, however, by the appellees, that at the date of the deed and at the time it was acknowledged he gave the deputy clerk taking the acknowledgment the money for tax and cost of recording it, and the deed, when found, was in the county clerk's office. While the statute provides that a deed shall not be regarded as lodged for record until the tax is paid, it does not provide the manner in which proof may be made, when the payment of the tax is placed in issue. The usual mode of evidencing its payment is by an indorsement on the deed, but the absence of this indorsement will not preclude the grantee from showing, by the clerk or others, the payment of the tax. The neglect of the clerk to make such indorsement when the tax has been actually paid should not be permitted to destroy the legal effect of the conveyance.

The payment of the tax the second time by Wood was unknown to appellee, and was paid under the impression or with a knowledge of the fact that the then clerk would not record the deed without the

tax. We think it is shown that the conveyance was properly lodged for record, and in addition that the appellant knew of the conveyance. Slight proof connected with the lapse of time and their facilities for ascertaining the business transactions of the parties would authorize the conclusion as to knowledge on their part, and the execution of the conveyance, the validity of which is for the first time asserted by them in this action, a period of nearly nine years from its execution.

The claim of the son's wife to dower presents a question of more difficulty. She acknowledged it before the deputy clerk, who made a memorandum of that fact in September, 1869. This certificate or memorandum has never been recorded or made part of the certificate by the clerk of the court evidencing the acknowledgment by the parties. In order to pass the title of the feme, or to make the conveyance evidence against her, it was required by the Act of March 9, 1854, that the clerk shall write out and sign the certificate, setting forth in such certificate the facts, including the endorsement, and thereupon the deed shall be as good and effectual as if, etc. This has not been done in the present case, although if properly certified and lodged for record within the proper time it would pass the title of the feme. In this case no certificate has been made, as appears on the face of the paper, that would make the conveyance operate to divest her of title. The original conveyance, having been offered in evidence, cannot affect her rights, when at the same time it appears that she was a feme covert when the paper was executed and delivered.

It is urged, however, that, the wife becoming discoverd after the execution and delivery of the deed, this removes all obstacles in the way of the title. This position, we think, is not tenable. It is the status of the party at the time the conveyance was made that must determine the rights of the parties, unless when the disability has been removed the feme has in some way cured the defects in the title.

Nor can the certificate be amended on the return of the cause, as the deed, with a proper certificate upon it, must have been recorded or lodged for record within the proper time so as to affect the rights of the married woman. Mrs. Drabbell is therefore entitled to dower.

The conveyance is of all the right, title and interest in and to the real estate of every kind which Harkness owned at the time of his death. It was not what Calvin inherited, but all that he owned at the time of the conveyance.

The judgment below is *affirmed* as to Netherland, and the appellee may have his execution for costs against him, and is *reversed* as to Drabbell and wife, and they have their costs against appellee, and cause remanded for further proper proceedings.

J. R. Robinson, R. S. Montague, for appellants.

William Lindsay, James M. Wood, for appellees.

R. GUDGELL *v.* BATH COUNTY COURT.

[Abstract Kentucky Law Reporter, Vol. 1—336. Reported in full in 8 Ky. L. 677.]

Compensation of County Attorneys.

A county attorney is entitled to a reasonable salary out of the county levy, but as to the amount thereof the court of claims must judge, subject to the right of appeal to the circuit or to the common pleas court when the claim is for \$20 or more, and such a case is triable *de novo* by such appellate court.

APPEAL FROM BATH COURT OF COMMON PLEAS.

October 21, 1880.

OPINION BY JUDGE HARGIS:

"He (the county attorney) shall be allowed annually, at the court of claims, a reasonable salary out of the county levy." Section 8, Art. 3, Chap. 5, General Statutes.

This is the provision for the payment of county attorneys for their official services. The law has fixed the fact that the attorney shall have an annual salary, but as to the amount thereof the court of claims is the judge, governed by the requirement that the sum shall be reasonable. The court has no discretion about the matter, except as to the amount, and that limited within reasonable bounds.

The court of claims, on motion of appellant for a reasonable salary out of the county levy for one year's services as county attorney, allowed him the sum of \$150, to which he objected and excepted, and prosecuted an appeal to the Bath Court of Common Pleas, which court dismissed his appeal because he had not demanded from the court of claims a specific sum or amount for his salary.

By Sec. 11, Art. 3, Chap. 27, Gen. Stat., it is provided that any person presenting a claim for allowance before a county court of levy and claims for twenty dollars or upward shall have the right to appeal to the circuit court from the judgment or order of said court

rejecting said claim, or any part thereof, as appeals are now taken from judgments of the quarterly court.

This law authorizes the circuit court (the common pleas court having the same jurisdiction) to hear the case *de novo* on appeal. It seems to us that the spirit and intent of the statute, *supra*, is that where the law directs that a reasonable sum shall be allowed as a salary to a public officer for his official services, the presentation of such claim, with the facts showing it to be of the class provided for by law, and asking the court to make the reasonable allowance, without fixing the amount in the claim, is sufficient to authorize an appeal, provided the service so claimed to have been rendered is in value twenty dollars or upward.

There is no difficulty in ascertaining the fact whether the services constituting the claim were of the value of twenty dollars or upward. If the proof should show that a reasonable sum was less than twenty dollars, or the sum allowed, then a dismissal of the appeal would be proper.

Wherefore the judgment is *reversed* and cause remanded for further proceedings not inconsistent with this opinion.

Chief Justice Cofer dissenting.

R. & W. S. Gudgell, for appellant. J. S. Hurt, for appellee.

[Cited, *City of Newport v. Berry*, 80 Ky. 354, 4 Ky. L. 185; *Ohio County Court v. Newton*, 79 Ky. 267.]

C. W. ROBINSON v. W. J. AMANN.

[Abstract Kentucky Law Reporter, Vol. 1—326.]

Motion for a New Trial.

Where a plaintiff and his attorney, both believed that their cause would not be reached for trial on a certain day when it was assigned for trial, were absent when the case was tried and a verdict rendered for the defendant before a motion for a new trial can be allowed, such plaintiff must make it to appear that the absence of himself and counsel was caused by an unavoidable casualty or misfortune, and facts showing that the result of the trial would have been different if himself and counsel had been present.

APPEAL FROM McCRACKEN CIRCUIT COURT.

October 21, 1880.

OPINION BY JUDGE HINES:

Appellant and his counsel, believing that the cause would not be

reached for trial, were both absent from the court when the answer was filed, and the case tried and verdict rendered for appellee. On the day following a motion for a new trial, upon the ground of surprise, was made and overruled. There appears to us to be two reasons why the judgment should not be disturbed.

First: The absence of appellant and his counsel does not appear to have been caused by any unavoidable casualty or misfortune; and, Second: There is nothing to indicate that the result would or should have been different if counsel or the client had been present. The affirmative matter in the answer, when uncontroverted by reply, entitled appellee to a verdict. Appellant tendered no reply on his motion for a new trial, nor is it in any way intimated that he could have truthfully controverted the matters set up in the answer. *Lan-drum v. Farmer*, 7 Bush 46; *Yancey v. Downer*, 5 Litt. 8; *Embry v. Devinney*, 8 Dana 202.

Judgment affirmed.

W. G. Bullitt, Henry Barnett, for appellant.

J. W. Bloomfield, for appellee.

WILLIAM H. BEAZLEY v. A. J. MERSHAN.

[Abstract Kentucky Law Reporter, Vol. 1—333.]

Sale in Gross and not by the Acre.

Where a mortgage covered an entire tract of land supposed to embrace two hundred sixty-seven acres, and is ordered sold in foreclosure and offered, but no person offered to pay the debt for any less number of acres, and the land was cried off to the plaintiff upon his offer to take the land for his judgment and costs, and the sale is confirmed, this is conclusive that it was in gross and not by the acre.

APPEAL FROM GARRARD CIRCUIT COURT.

October 21, 1880.

OPINION BY JUDGE COFER:

The mortgage was of the entire tract of land "supposed to embrace two hundred and sixty-seven acres", and the judgment was to sell "the tract of land mentioned and described in the mortgage exhibited, and all the right, title and interest therein of both the defendants." The commissioner reported that no one offering to pay the judgment for less than the whole tract, "the plaintiff, A. J. Mer-

shan, then offered and bid to take the land for his judgment and costs", and no person offering to "pay the debt for any less number of acres, the land was cried off to the plaintiff."

The sale was reported to the court and confirmed without exceptions or objections. Sale was directed to be made of the whole tract, or so much of it as was necessary to pay the debt, and he did sell it for the debt and costs, and that report, having been confirmed, is conclusive that the sale was in gross and not by the acre, and the judgment must be affirmed.

R. M. & W. O. Bradley, for appellant.

W. D. Hopper, for appellee.

A. CAMPBELL'S COMMITTEE v. HENRY BULLOCK.

[Abstract Kentucky Law Reporter, Vol. 1—333.]

Sale of Store by a Committee.

While some of the acts of a committee in the sale of a stock of goods were not authorized by law, but such a sale was honest and greatly to the advantage of the estate, and no injury was sustained by such sale, no objections made by the committee's successor, and no suit brought for conversion or for the recovery of the goods, such sale is ratified.

APPEAL FROM PENDLETON CHANCERY COURT.

October 21, 1880.

OPINION BY JUDGE COFER:

While many of the acts of the appellee as committee for A. Campbell were not authorized by law, there can be no doubt but that he acted in the utmost good faith, and it is equally clear that his successor has failed to show that any injury was sustained in consequence of what he did.

That the miscellaneous and ill-conditioned stock of goods could not have been sold at public sale for as much as the appellee sold it for we entertain no doubt. The appellant did not ask the court to declare the sale invalid, nor to permit him to sue for the recovery of the goods or for damages for their conversion, but by the course he has taken has ratified the sale; and as he has failed to show that any injury resulted to the estate from the act thus ratified he has no ground to complain on this point of the judgment of the court below.

The same is true of the renting of the storehouse, which under the circumstances seems to this court not to have been improvident.

The evidence shows that the repairs and improvements put upon the storehouse were not only necessary and proper to be made, but are worth more than a year's rent of the house in the condition it was in before the work was done.

The account of Stevenson & OHara includes something for services rendered to the appellee as committee, but it also includes other services. We cannot assume that any considerable part was for services rendered for him as committee and reverse on that ground; nor are we prepared to say that the appellee did not have a right to charge the estate with reasonable counsel fees. As he does not appear to have had any other allowance on that account, we would not reverse for that item, even if it appeared that a large part of it was for services rendered the committee.

The allowance to the committee is large, and if that item alone had been contested we should have been inclined to decide that it was too large. But when we consider the fact that the appellee hired a clerk to aid him in selling off a large part of the stock, and in attending to the business of the estate, and that from the nature of that business it required and received a great deal of personal attention from him, and that he has been put to expense to defend his action in almost every particular, although evidently for the best interest of the estate, and has been compelled to employ counsel to aid him in his defense, both in the court below and in this court, we regard the allowance as not unreasonable, and the judgment is *affirmed*.

C. H. Lee, S. Buckley, for appellant.

Clarke & Simon, for appellee.

WILLIAM P. ADAMS *v.* H. J. CRAYCROFT, ET AL.

[Abstract Kentucky Law Reporter, Vol. 1—330.]

Peremptory Instruction.

Where there is some evidence conducing to prove the contention of a party, it is error for the court to instruct the jury to find for the other party. The evidence in such a case should be submitted to the jury for its determination.

APPEAL FROM JEFFERSON COURT OF COMMON PLEAS.

October 21, 1880.

OPINION BY JUDGE COFER :

Upon a re-examination of the record in this case we are satisfied that the assignee of Craycroft, having been made a party plaintiff and both having replied to the cross-action and denied that either had wrongful possession of the mules, and also denied appellant's title, the objection to the original answer arising on the record as it stood when that pleading was filed has been obviated. Having answered the cross-action on the merits and gone to trial without objecting that it could not be set up in this case, it was too late to make that objection, if indeed it could ever have been successfully made in view of the alleged insolvency of Craycroft. *Boyd v. Day*, 3 Bush 617.

The issue presented was triable at law, and there was some evidence conducing to prove that the mules belonged to the appellant which ought to have been submitted to the jury, and the court erred in instructing them to find for the plaintiff. If they had found for the appellant the judgment would have been for any damages found, and for the recovery of the mules if to be had; if not, for their value as found by the jury. The damages found, if any, could have been set off by the common-law court against the note sued on. But the alternative judgment for the mules or their value could not have been set off at law against the note, at any rate not until a return that the mules could not be found. The court would, therefore, have been compelled to render judgment for the plaintiffs for the excess of the note over the damages found in favor of the defendant.

But if this had been done the defendant might have enjoined the judgment against him, if necessary, until he could get a return if the mules were not to be had, and then, having a judgment for their value he could set it off under the statute providing for setting off judgments against each other. As it is not at all possible that the mules can now be had, and as there has been a conversion of them if they belonged to the appellant, it will shorten and simplify this litigation if the appellant is permitted to file an amendment setting up the conversion as proposed in the amendment rejected by the court.

Judgment *reversed* and cause remanded for further proper proceedings.

James S. Pirtle, N. T. Crutchfield, for appellant.

Russell & Helm, for appellees.

[Distinguished, *Rennebaum v. Atkinson*, 21 Ky. L. 587, 52 S. W. 828.]

STEPHEN ALLEN *v.* A. C. TERRELL, ET AL.

[Abstract Kentucky Law Reporter, Vol. 1—336.]

Wills—Construction of Wills.

Where a devise is to a named woman and the heirs of her body it creates an estate tail, and she will take an absolute estate; but where a devise is to a named woman for life with remainder to the heirs of her body, her children, who are the devisees of the remainder, will take an absolute estate.

Rule in Shelley's Case.

The rule in Shelley's case has never prevailed in this state.

APPEAL FROM FRANKLIN CIRCUIT COURT.

October 21, 1880.

OPINION BY JUDGE COFER:

It is clear that Mrs. Allen did not take under the will the same estate that she would have taken if her mother had died intestate (unless the will created in her an estate tail), as she took only a life estate by the terms of the will. It is equally clear that she did not take an estate tail. If the devise had been to her and the heirs of her body it would have created an estate tail, and she would have taken an absolute estate under our statute.

But the devise being to her for life with remainder to the heirs of her body, her children, who are the devisees of the remainder, took an absolute estate under the statute. Under the rule in Shelley's case she would have taken an estate in fee, but that rule never prevailed in this state. *Turman v. White*, 14 B. Mon. 450.

Nor do we think her husband is a devisee by implication, and entitled to curtesy in that character. The decisions in *Jacob v. Jacob*, 4 Bush 110, and *Johnson v. Jacobs*, 11 Bush 646, were rested upon the ground that the testator directed that the shares of his children, or such portion of the shares as were in contest in those cases, should, at the death of the child, be conveyed and paid to the descendants of such child, if any were living, "in the same manner as it would pass by the law of descent if it were to descend from him." The court held that as the testator had thus manifested his intention that his grandchildren should take as if they had inherited from their deceased parents, therefore he intended the surviving wife or husband of a deceased child should have dower or curtesy as if such deceased child had owned an estate of inheritance instead of an estate for life.

Whether this is not a *non sequitur*, and whether Judge Robertson's separate opinion, in the former case, does not rest upon the better ground we need not inquire, as the will in this case neither provides how the descendants of Mrs. Allen should take at her death, nor vested in her an equity which passed by descent from her to her children, which would have entitled her husband to curtesy. She had a naked life estate, and no more, and her children took under the will without regard to the law of descent, and derived nothing whatever from her, so that neither the ground upon which the prevailing or the minority opinion was made to rest in these cases has any existence in this case.

Wherefore the judgment is *affirmed*.

John L. Scott, James A. Scott, for appellant.

Ira Julian, for appellees.

[Cited, *Young v. Amburgy*, 27 Ky. L. 1079, 87 S. W. 802.]

JOEL C. McGUIRE v. JAMES M. McGUIRE.

[Abstract Kentucky Law Reporter, Vol. 1—328.]

Partition of Land by Contract.

When it is agreed by two parties that land is to be divided between them, in the absence of proof to the contrary, the conclusion must be that it was the intention to divide the land into two equal parts.

APPEAL FROM CARTER CIRCUIT COURT.

October 22, 1880.

OPINION BY JUDGE HINES:

The evidence in this case appears to us sufficient to warrant the judgment of the court. The statement by appellant himself is that it was agreed that the land was to be divided between appellee and himself, and, in the absence of proof to the contrary, the conclusion would be that it was the intention and agreement of the parties to divide the land into two equal parts. This strengthens the evidence in support of the claim of appellee that there was a mistake in drawing the bond, and upon this point the preponderance, if not the decided weight of the evidence, is to the effect that there was a mistake.

Judgment *affirmed*.

J. R. Bott, E. B. Wilhoit, for appellant.

R. D. Davis, for appellee.

ALICE FANNESSEY *v.* EDMOND FANNESSEY, ET AL.

[Abstract Kentucky Law Reporter, Vol. 1—328.]

Estoppel to Defeat Dower.

Neither the husband guilty of alleged fraud or those claiming under him as volunteers, or who accept conveyances from him with knowledge that they were made for a fraudulent purpose, can be heard to say that the husband was not seized of the land during coverture, in order to defeat the wife's claim to dower.

APPEAL FROM KENTON CHANCERY COURT.

October 23, 1880.

OPINION BY JUDGE COFER:

In *Hobbs v. Blandford*, 7 T. B. Mon. 469; *Petty v. Petty*, 4 B. Mon. 215; *McAfee v. Ferguson*, 9 B. Mon. 475; *Leach v. Duvall*, 8 Bush 201, and *Cheshire v. Payne*, 16 B. Mon. 618, this court has announced the general doctrine that facts such as are set out in the petition in this case entitle the defrauded husband or wife to relief. These facts make out a *prima facie* case, and if there be any other facts which rendered that legal which, on the statements of the petition, is fraudulent and illegal, they should be pleaded by way of defense.

Neither the husband who was guilty of the alleged fraud, or those who claim under him as volunteers, or who accepted conveyances from him with knowledge that they were made for the fraudulent purpose charged, can be heard to say that the husband was not seized of the land during coverture, in order to defeat her claim to dower. For the purpose of this case the fraudulent seizin of the grantees was the seizin of the husband. As well might a fraudulent grantee set up the champerty law against a creditor of the grantor who had disregarded the fraudulent deed and levied on the property as the property of the debtor.

Judgment *reversed* and cause remanded with directions to overrule the demurrer and for further proper proceedings.

Simmons & Schmidt, for appellant. L. J. Blakely, for appellers.

JOSEPHINE R. REID, ET AL., v. JOHN BOWMAN'S EXECUTOR, ET AL.

[Abstract Kentucky Law Reporter, Vol. 1—331, as *Reid v. Rowan's Ex'r.*]

Will—Construction of Will.

Where a testator devises a life estate in real estate to his son, but provides that "upon the death of my son, John, his wife living, she is to possess his portion of his life estate during her widowhood for the raising and education of his children, but upon her marriage the whole of his life estate is to pass to her children in fee, share and share alike according to value" it is held that the estate is not to pass to the children when they are raised and educated, but when their mother ceases to be a widow until that event she is entitled to the possession and enjoyment of the estate.

APPEAL FROM LOUISVILLE CHANCERY COURT.

October 23, 1880.

OPINION BY JUDGE PRYOR:

We think there is no doubt but that the estate in controversy, or the title thereto, is vested in the widow and children of John Bowman, Jr., in the widow during her widowhood. There is no contingent interest created by the will, the time of the enjoyment by the children being alone postponed, as in all cases of vested remainders, but the title vested without any contingency whatever. The draftsman of the testamentary paper knew the object in view and the language necessary to be used in order to divest the widow of all interest in the estate after she had raised and educated her children. He would have said when this object was accomplished: "My daughter-in-law is to deliver over the estate to her children, or they are to have their share as they severally arrive at age." It was certainly the purpose of the deviser that no one else should enjoy this estate except the widow and children of his deceased son, and here he provides that she is to hold the property so long only as she remains a widow.

It would be a disregard of his benevolent intention, as well as the plain language of the testamentary paper, to hold that knowing the care and burden on his widowed daughter-in-law in raising and educating her infant children, he proposed the moment they were of age to divest her of the entire estate. On the contrary the language of the will manifests a plain intention that for raising and educating the children she is to hold the estate as long as she remains a widow. "Upon the death of my son, John, his wife living, she is to possess his

portion of his life estate during her widowhood for the raising and education of his children, but upon her marriage the whole of his life estate is to pass to her children in fee, share and share alike according to value," not that the estate is to pass to the children in fee when they are raised and educated, but when their mother ceases to be a widow. Then, and not until then are they entitled to the possession and enjoyment of the devise to them. That she was required to raise and educate the children out of this estate is certain, but when this was accomplished, the burden upon her and the estate is removed so long as she continues unmarried. That she has discharged this trust is conceded by the statements of the petition, and the demurrer was therefore properly sustained.

Judgment affirmed.

E. E. McKay, S. C. Reid, for appellants.

P. B. Muir, for appellees.

ANDREW HEMPHILL'S ADM'R, ET AL., v. JOHN W. MILLMORE, ET AL.

[Abstract Kentucky Law Reporter, Vol. 1—331.]

Bond for Deed.

A person holding a bond for a deed or his assignee in order to demand title, must comply with the bond under which he claims before the chancellor will require the heirs to surrender the title.

Usurious Interest.

If there is usurious interest in a judgment the owner is required to purge it of the usury in pursuance of the statute regarding the settlement of decedent's estates; and while a judgment at law may embrace usury, the debtor cannot ordinarily resort to a court of equity and reclaim it, or have the judgment modified; but when he satisfies the judgment the debtor may at law recover back the usury. An administrator, however, is not required to pay the usury and then recover it back, because the statute requires the creditor to plead it or purge it of all usury by his oath before his claim will be allowed.

APPEAL FROM JESSAMINE CIRCUIT COURT.

October 23, 1880.

OPINION BY JUDGE PRYOR:

Lewis, the son of the intestate, held only a bond for title to the land of which he was possessed at the time of his assignment. The purchase-money had never been paid, as is conceded from the plead-

ings and proof; nor has there been any change of security by which this lien has been discharged. That Lewis claimed to be the owner, and in that sense held adversely, may be true; but when he or his assignees demand title they must comply with the bond under which they claim before the chancellor will require the heirs to surrender the title.

We see no facts in this record upon which either the defense of limitation or payment of the purchase-money could be interposed to prevent the chancellor from subjecting the property to the payment of the lien debt, and being a lien it must have a preference over other claims. It does not satisfactorily appear whether Brown has made an absolute conveyance, without retaining any lien, of the portion of the tract to which he seems to have held the title. If he has made such a conveyance the lien to that extent is gone, but as to the remaining land the lien necessarily exists. A question is made as to the want of a proper affidavit; if no such affidavit has been made, it should be required before the lien is enforced.

No exception to the commissioner's report was necessary to enable these parties to appeal. Their claim was asserted in the pleadings and denied by the court, and of that judgment they complain. The heirs of Hemphill or his administrator have been negligent in delaying the collection of this purchase-money, and their vendee has been equally as negligent in obtaining his title, and before he gets it he must comply with his bond.

If there is usurious interest in the judgment the appellant is required to purge it of the usury by an express pursuance of the statute in regard to the settlement of decedent's estates. While a judgment at law may embrace usury, the debtor cannot ordinarily resort to a court of equity and reclaim it or have the judgment modified to that extent, because he could have made such a defense before judgment; but although this defense could have been made, when he pays or satisfies the judgment, the debtor may by an action at law recover back the usury. In this class of cases it is not necessary that the administrator should pay the usury and then sue to recover it back, because the statute interposes in behalf and requires the creditor to plead it, or to purge it of all usury by his oath or affidavit before his claim will be allowed. The judgment was therefore not conclusive, and, to the extent it embraced usurious interest, the cross-appellant was not entitled to recover.

Judgment *reversed* on the original and *affirmed* on the cross-appeal, and cause remanded for further proceedings.

Breckinridge & Shelby, for appellants.

H. A. Anderson, J. S. Branaugh, for appellees.

[Cited, *Crenshaw v. Duff's Ex'r*, 31 Ky. L. 773, 103 S. W. 287; *Owsley v. Boles*, 124 Ky. 775, 99 S. W. 1157.]

CHARLES D. POPE'S EX'R *v.* DUDLEY WEBER, ET AL.

[Abstract Kentucky Law Reporter, Vol. 1—329.]

Power of Trustee to Encumber Property by Making Improvements.

A trustee has no power to endanger the whole trust estate by making unnecessary improvements on the real estate in his hands.

APPEAL FROM LOUISVILLE CHANCERY COURT.

October 23, 1880.

OPINION BY JUDGE COFER:

The lot leased in this case had on it at the time it was leased a two-story brick house. It is not shown to have been untenable. No necessity for the character of lease that was made is shown. On the contrary we are justified in assuming that the house then on the lot was fit for use, and had been and might have been rented, with the ordinary repairs, until this time. These facts are sufficient to distinguish this from the case of *Greason v. Keteltas*, 17 N. Y. 491, where the lease was of a vacant and unimproved lot subject to large assessments and taxes. Moreover, in that case it was proved that the lease made, in view of all the circumstances, was reasonable and proper, "great exertions having been made by the testator in his lifetime, and required after his death, to lease the property with a view to the payment of taxes and assessments."

Under such circumstances there was probably no other way in which the property could be preserved. In the case at bar the lot was already improved, and no effort was made to show that in its then condition it could not be rented at a reasonable sum, and for aught in this record it might have been worth all the lessee agreed to pay for it without subjecting the estate to loss in a sale to pay for the lessee's improvements. That the lessee acted in good faith cannot avail his assignee. He knew the condition of the property, and was bound to know the extent of the powers of the trustee.

To subject the property to the payment of the costs of these im-

provements, or the amount that they may have enhanced its vendible value, because the trustee and lessee mistook the extent of the former's powers, would be to endanger the whole trust estate by visiting upon the *cestui que trust* the consequences of the mistake of the trustee to whom the title was committed for their security, and thus to convert that which was intended for the protection of their interests into an instrument for its destruction.

But the improvements put upon the lot have enhanced its value very greatly. The trustee had power to dispose of the rents, and for the rent unpaid at the end of the term no judgment should have been rendered. Neither party offered any evidence as to the value of the rent after the term expired. The receiver rented it for \$35 per month. That is a safe criterion of its value, and for the time elapsing between the end of the term and the surrender of possession rent should be charged at that rate.

There is no evidence that Mrs. Weber received anything from her father's estate. The deposition of her husband was excluded on appellant's motion.

The judgment for rent is *reversed*, and the cause is remanded for a judgment in conformity with this opinion. The judgment dismissing the petition is *affirmed*.

J. T. O'Neal, Young & Boyle, for appellant.

Thornberry & Hopkins, for appellees.

AMERICA TANNER, ET AL., v. J. W. HOWARD.

[Abstract Kentucky Law Reporter, Vol. 1—343.]

Suit to Subject Property to Pay a Judgment.

A proceeding to subject the defendant's interest in property to pay a judgment against him can only be maintained after execution and a return of no property found, and such an execution must be directed to the county where the judgment was rendered or of the defendant's residence.

Jurisdiction of Parties.

In a suit to subject an interest in property to pay a judgment against the owner of such interest all parties in whom was the equitable title should be brought before the court.

APPEAL FROM DAVIESS CIRCUIT COURT.

October 26, 1880.

OPINION BY JUDGE HINES:

This is a proceeding, under Sec. 474 of Myers' Code (439 of the present code), after return on "no property" on an execution on a common-law judgment, to subject real estate, in which the defendant in the execution had an equitable interest, to the payment of the debt. After the institution of the action the defendant, who was warned to appear, died, and an attempt was made, under Sec. 566 of Myers' Code, to revive the action against the heirs, some of whom were infants. Without any affidavit as to the nonresidence of the heirs, as required by Sec. 89, an order of revivor was entered against them and served on a portion of them and returned "not found" as to others. No guardian was appointed by the court to defend for the infants served as required by Chap. 4, Art. 3, of Myers' Code; nor was there any amended pleading making the infant heirs parties to the action. By amended pleading it appeared that Taylor held the legal title to the land sought to be subjected to the payment of the claim of appellee, and he was by order of court made a party to the action; but he was not brought before the court by process. From a judgment of sale and an order confirming the commissioner's report of sale the heirs and the purchaser appeal.

There are several reasons why we think the judgment should be reversed:

1. The petition does not allege that the execution on the common-law judgment was directed to the county in which the judgment was rendered or to the county judge of the defendant's residence, as required by Sec. 474 of the code. The allegation is, "that execution issued on said judgment and was placed in the hands of the sheriff, but said officer failed to make any part of it, owing to the legal insolvency of the said defendant." This is not sufficient. *Maddox v. Fox*, 8 Bush 402. 2. All the parties in whom was the equitable title were not before the court.

3. Taylor, in whom was the legal title, was not before the court.

4. No guardian was appointed to defend for the infant defendants who were before the court, if any were properly before the court.

5. The heirs were never made parties to the action by proper pleadings so as to bind them by the decree.

Wherefore the judgment is *reversed* and cause remanded with directions for further proceedings.

George W. Jolly, for appellants.

E. F. KELLY, ET AL., v. S. A. McCLUNG, ET AL.

E. F. KELLY, ET AL., v. GEORGE W. STAINBACK, ET AL.

[Abstract Kentucky Law Reporter, Vol. 1—348, as *Kelley v. Stainback*.

Sale to Defraud Creditors.

The insolvency of a pretended purchaser up to the time of a sale to him, together with the act of the seller in disposing of all of his property and his disappearance to avoid his creditors, are sufficient to justify the court in finding that such a transfer was without consideration and with intent on the part of both the seller and purchaser to defraud the seller's creditors.

APPEALS FROM CHRISTIAN CIRCUIT COURT.

October 26, 1880.

OPINION BY JUDGE HINES:

The evidence of a fraudulent attempt on the part of Kelly and McCutcheon to prevent the creditors of Kelly from making their debts is manifest throughout this record. The conceded insolvency of McCutcheon up to the pretended purchase of the personal property from Kelly, together with the act of Kelly in disposing of all his property and his disappearance for the manifest purpose of avoiding his creditors, are enough in themselves to justify the court in finding that the transfer of the personal property to McCutcheon was without consideration, and with the intent on the part of both Kelly and McCutcheon to defraud the creditors of Kelly.

As to the real estate subjected, it is still more manifest that the transfer to McCutcheon was fraudulent. Although there is a recited consideration of \$250 in hand paid by McCutcheon, it is admitted that nothing was paid; but it is insisted that McCutcheon held the property in trust for the wards of Kelly. If such had been the desire of the parties it is not easy to explain why it was not so expressed in the deed. Even if it had been so expressed and it had been the desire of Kelly to secure the property to his wards the conveyance could not stand. The legal title to the land was in Kelly when these debts were contracted and there was no notice to the creditors that the property was held by Kelly in secret trust for his wards. Such a trust might have been established against Kelly, but not in such a way as to affect his creditors.

There was no error in the failure of the court below to quash the bond given by McCutcheon as claimant of the personal property.

There is no attempt to enforce the bond, and if there was such an attempt it could not alter the case, as McCutcheon gave no security, and he alone is responsible on the bond. The court having adjudged the property belonged to Kelly, we fail to perceive any right McCutcheon has to complain that the bond was made payable to the sheriff instead of the plaintiff in the proceeding.

Judgment affirmed.

S. J. Boyd, for appellants.

Wood & Wood, James D. Hays, for appellee.

REBECCA MORGAN, ET AL., v. WILLIAM DENNY, ET AL.

[Abstract Kentucky Law Reporter, Vol. 1—346.]

Will—Construction of Will.

Where a bequest reads "to my son-in-law * * * and my daughter Ann Mariah Denny" certain real estate "to be theirs during the natural life of my daughter * * * and so long thereafter as there may be a living heir or heirs of her body * * * ; and in the event at any time of the failure or extinction of an heir or heirs * * * then and in that case all right and title, as well as the possession of, in and to said 490 acres of land, shall revert and descend to and invest in my son James A. Morgan, and his heirs," it is held that the daughter took a life estate jointly with her husband and after her death it gave him a life estate subject to determination by the failure of issue of the body of the wife in his life time, with remainder in fee simple to the heirs of the body of said daughter of the testator.

APPEAL FROM MADISON COURT OF COMMON PLEAS.

October 26, 1880.

OPINION BY JUDGE HARGIS:

This action was brought to construe the third clause of the will of Robert N. Morgan, which is as follows, viz.:

"I do hereby will and bequeath to my son-in-law, Wm. K. Denny, and my daughter, Ann Mariah Denny, my tract of land near Kirksville, containing, at present, 490 acres to be theirs during the natural life of my daughter, Ann Mariah Denny, and so long thereafter as there may be a living heir or heirs of her body. The tract of land bequeathed as above shall remain in the possession and control of the said Wm. K. Denny, but the right and title of said 490 acres shall never pass or vest in any other person or persons beside such

lineal offspring of my daughter, Ann Mariah Denny; and in the event at any time of the failure or extinction of an heir or heirs (I mean an heir or heirs of the body of my daughter, Ann Mariah Denny) then and in that case all right and title, as well as the possession of, in and to said 490 acres of land shall revert and descend to and invest in my son, James A. Morgan, and his heirs."

The devise over to the testator's son, James A. Morgan, and his heirs after the failure of issue and extinction of lineal offspring of his daughter, Ann Mariah Denny, is violative of the rule of law forbidding perpetuities. *Moore v. Howe*, 1 T. B. Mon. 201; *Ludwig v. Combs*, 1 Met. 128; *Attorney General v. Wallace*, 7 B. Mon. 611.

Under this clause of the will the daughter, Ann Mariah Denny, took a life estate jointly with her husband, Wm. K. Denny, and after her death it gave him a life estate subject to determination by the failure of issue of the body of Ann Mariah Denny in his lifetime, with remainder in fee simple to the heirs of the body of said Ann Mariah Denny.

The judgment is therefore *affirmed*.

Travis Morse, for appellants. Chenault & Bennett, for appellees.

G. W. MARTIN v. WILLIAM WHITE.

[Abstract Kentucky Law Reporter, Vol. 1—347.]

Award of Arbitrators.

After arbitrators have signed their award and adjourned their power ceases, and they have no right to alter the award without the consent of both parties; and any effort by such arbitrators to make a new award between the parties is a nullity.

APPEAL FROM BALLARD COURT OF COMMON PLEAS.

October 26, 1880.

OPINION BY JUDGE HINES: .

We are of the opinion that the award of December 18, 1875, should have been enforced. It came within the terms of submission and is complete upon its face. It adjudges that Martin shall pay White a specific sum of money without condition or qualification. It is signed by the arbitrators and the umpire, and is stated by them to be a settlement of the partnership affairs submitted to their arbitration, but, as claimed by them, there was no understanding that any

error committed by them might be corrected at some future time. After signing the award and adjourning their power over the matter ceased; they had no right to alter it in any way without the knowledge and consent of both parties, any more than they had a right to make an entirely new award; and consequently the pretended award dated December 25, 1875, is a nullity.

It is immaterial that a written copy of the award was not given to each of the parties. The terms of the submission were complied with in reducing the award to writing, which was the only condition stipulated for in the agreement to submit to arbitration. This was a common-law award, and under the submission the parties had a right to make any stipulation they chose as to notice; and having provided that the award should be reduced to writing notification in any way of its terms was sufficient. The understanding of the arbitrators as to the effect of the award is entitled to no consideration in determining its meaning. The writing must speak for itself.

Judgment *reversed* and cause remanded for further proceedings.

Buggs & Bishop, J. M. Bigger, for appellant.

J. M. Nichols, for appellee.

WILLIAM L. MURPHY v. JOHN BOYD.

[Abstract Kentucky Law Reporter, Vol. 1—345.
Later Reported in Abstract, 4 Ky. L. 441.]

Mortgages on Partnership Property.

Among purchasers of different portions of mortgaged property the common burden must be borne ratably; and where a partnership debt is secured by a mortgage on partnership real estate, and also on real estate belonging to one of the partners, the partnership realty cannot be required to be exhausted before selling the mortgaged realty of the member of the firm.

APPEAL FROM LOUISVILLE CHANCERY COURT.

October 26, 1880.

OPINION BY JUDGE COFER:

In 1863 Charles Miller & Co. executed to the Northern Bank of Kentucky a mortgage upon certain real estate owned by the firm and known as the wharf property, and on the same day, as we assume, Charles Miller, a member of said firm, executed to the bank a mortgage upon the lot on Preston street owned by him individually to secure the same debt.

Subsequently Miller sold and conveyed the Preston street property to the appellant, W. L. Murphy, who paid the entire purchase-money. After Murphy had purchased the property, paid a part of the purchase-money and received a deed, Miller & Co. executed other mortgages on the wharf property for greatly more than its value. Murphy completed his payments without notice of the subsequent mortgages.

The question on this appeal is whether the lot sold to Murphy shall bear a part of the burden of the debt to the bank, or whether the whole shall be borne by the wharf property, which is sufficient to satisfy the bank, but insufficient to satisfy it and the subsequent mortgages.

This court has repeatedly held that among purchasers of different portions of mortgaged property the common burden shall be borne ratably, and in *Dickey v. Thompson*, 8 B. Mon. 312, after reviewing many cases on the point, the court said the principle had been so often acted upon and announced by this court that it had acquired the character and weight of a rule of property, and could not be departed from without doing practical injustice.

It is attempted, however, to distinguish this case from the class to which *Dickey v. Thompson* belongs upon two grounds: First, that the Preston street lot was the individual property of Charles Miller, and therefore the wharf property, which is partnership property, should be first exhausted; and second, that the subsequent mortgagees are not purchasers within the meaning of the rule under which a common burden will be apportioned.

The first proposition cannot be maintained. As between the firm and Charles Miller he may have had an equity which would have entitled him to have the firm debts satisfied out of the firm property, but as a member of the firm he is individually liable for the firm debts, and the subsequent mortgagees stand in as favorable an attitude as if all the property had belonged to the firm.

A mortgagee is a purchaser *pro tanto*, and in a contest in which he seeks the enforcement of his mortgage he is entitled to the same protection and the same equities to which an absolute purchaser would be entitled. *Snyder v. Hitt*, 2 Dana 204; *Halbert v. McCulloch*, 3 Met. 456.

Wherefore the judgment is affirmed.

R. J. Elliott, for appellant. John Boyd, for appellee.

BENJAMIN GRANT *v.* ELIZABETH E. SETTLE.

[Abstract Kentucky Law Reporter, Vol. 1—344.]

Breach of Contract.

Where one contracts to build a house in consideration for the conveyance of real estate, and no time is agreed upon when it shall be built, the law implies that it was to be erected within a reasonable time and its construction to begin at once, as the contract had been performed by the other party to it.

Instructions.

In a suit for breach of contract in failing to erect a house there was no error in the court charging the jury that upon the failure to build the house the plaintiff was entitled to damages; and where it was claimed by the defendant that his failure to build the house resulted from the refusal of the plaintiff to board the hands the court very properly charged the jury if that was true no recovery could be had unless the plaintiff after that time had notified the defendant of her readiness to proceed with the work of furnishing such board.

APPEAL FROM ADAIR CIRCUIT COURT.

October 26, 1880.

OPINION BY JUDGE PRYOR:

The testimony is conflicting as to what the contract really was between the parties, but all concur in the statement that the appellant was to build a house which the appellee was to live in and control at a cost not exceeding \$2,000. That he failed to build the house is conceded, and the damages are not excessive or unwarranted from the proof. If the failure to comply with appellee's part of the contract prevented the appellant from building the house the jury was told that the verdict should be for the defendant, or that if she had committed waste on the premises by improper cultivation or a destruction of the timber unnecessarily the appellant was entitled to recover on his set-off. It was purely a question of fact as to the nature of the contract between the parties and its breach, and also a question of fact as to the alleged waste by the appellee.

It was not necessary that the contract should have been in writing. The appellant had accepted a conveyance from the appellee of all interest he had in that particular land, and as a part consideration was to build her a house. The law implies that it was to be erected within a reasonable time, and its construction to begin at once, as the contract had been performed on the part of the appellee. There was

no error in telling the jury that upon the failure to build the house the appellee was entitled to damages. That appellant was to build the house was conceded, and his failure to comply was alleged to have resulted from the refusal on the part of the appellee to board the hands. The court said to the jury if such was the case that no recovery could be had unless after the appellee had recovered her health she had notified the appellant of her readiness to proceed with the work. It was in the first place a question as to whether the appellee was to board the hands, and if she was, her being sick at the time the mechanics commenced the work, and thereby prevented from cooking for them for a short time, did not release the appellant from his obligation to construct the building. We certainly see nothing in this record authorizing any complaint by the appellant. While his version of the contract may be a correct one, the jury returned a verdict based on appellee's statements of what the contract was, and this court will not disturb the finding.

Judgment affirmed.

Alexander, Baker & Reed, for appellant.

T. C. Winfrey, for appellee.

[Cited, *Weller v. Monroe*, 21 Ky. L. 1705, 55 S. W. 1078; *Noland v. Cincinnati Cooperage Co.*, 26 Ky. L. 837, 82 S. W. 627.]

WILLIAM A. JACOBS v. LUCY W. WURTZ.

[Abstract Kentucky Law Reporter, Vol. 1—343.]

Estoppel to Claim Dower.

Where a married woman, to induce the court to set aside a sale of her husband's real estate subjected to pay his debts, offers to join in a resale and convey her dower interest, and a resale is ordered, the sale made and the purchase-money paid, and a commissioner of the court has conveyed the interest of the husband and wife, such married woman is estopped after the death of her husband to claim dower in such land.

APPEAL FROM GREENUP CIRCUIT COURT.

October 26, 1880.

OPINION BY JUDGE HINES:

An action was instituted against Wurtz to subject a certain piece of real estate to the payment of his debts, and sale having been made under decree of the court for that purpose the wife of Wurtz (ap-

pellee here) came into the case by petition and asked to have the sale set aside, and expressed a willingness to release all right to dower and to execute such conveyance as the court might direct to such person as might become purchaser at a resale. The court set aside the sale, appointed a commissioner to examine Mrs. Wurtz, separate and apart from her husband, and to explain to her the contents of the petition and the effect upon her interest of a sale made under such terms.

The examination was made by the commissioner, who reported that Mrs. Wurtz "declared that she understood the contents and effect of her petition; that she freely and voluntarily signed said petition and was still satisfied therewith, and did not wish to retract the same." The commissioner further reported that he explained to Mrs. Wurtz that the effect of a sale under such pleadings would be to divest her of her potential right of dower in the lands sought to be sold. This report of acknowledgment was returned to court and spread upon the record by order of the court. After this a second sale was had in which appellant became the purchaser, and a deed made to him by the commissioner under order of the court directing the conveyance of all the right, title and interest of Wurtz and his wife. Subsequent to this and after appellant had received conveyance, paid the purchase-money and taken possession of the land, Wurtz died and this action was brought by appellee, the wife of Wurtz, against appellant to recover dower. The court below adjudged her dower, and from that judgment this appeal is taken.

Counsel for appellee insists that as the statute prescribes the manner in which a married woman may divest herself of her potential right of dower there is no other method, and that, therefore, her rights are unaffected by her participation in the suit and the decree under which appellant purchased. While it is true that when by her own act and without the intervention of the court a married woman attempts to divest herself of such an interest in lands the statute as to execution, acknowledgment, etc., must be complied with, it is equally true that like our *sui juris* she may be bound by the decree of a court having jurisdiction of the person and of the subject-matter, and she may be estopped by her acts to claim dower. It is immaterial that the acknowledgment was taken by the commissioner out of the county where the suit was pending. It would have been good if taken anywhere, and even without any such acknowledgment at all she could have precluded herself from claiming dower by becoming

a party to the suit and consenting to the sale upon the terms embraced in the decree. She does not pretend to say that there was any fraud or mistake, and that she did not fully consent to the sale of her potential dower right; and appellant having purchased on her solemn assertion that she released dower, it is now too late to complain. She will no more be permitted to take advantage of her own wrong than one who is *sui juris*. *Simpson v. Coons*, Mss. Opin., March 11, 1880.

Judgment *reversed* and cause remanded with directions to dismiss the petition.

E. F. Dulin, for appellant.

E. C. Phister, G. T. Halbert, for appellee.

W. H. JONES, ET AL., v. E. M. SPENCER.

[Abstract Kentucky Law Reporter, Vol. 1—344.]

Levy by Sheriff.

Where the sheriff has made no levy, notwithstanding he has promised to make the debt out of one of the debtors, he may legally enforce the levy upon the estate of the other debtor, and he is not liable on any such a promise.

APPEAL FROM GALLATIN CIRCUIT COURT.

October 26, 1880.

OPINION BY JUDGE PRYOR:

There is no obligation imposed on a sheriff by reason of his bond or by virtue of his office to levy an execution upon the property of one judgment debtor for the protection of another bound jointly with him, unless the latter has in some way the control of the execution and that fact is known to the sheriff. Here Boaz and Spencer were jointly bound to the execution creditor, and the sheriff by the writ commanded to make the money out of the estate of both the execution debtors, the one so far as the sheriff was concerned as much liable as the other. If the sheriff had seen Boaz for the purpose of making the levy, and had been told by the latter that Spencer was the man who obtained the money for which the judgment was obtained, the sheriff would then be required, if this judgment is sustained, to investigate the liability of the parties in the judgment, the

one to the other, in order to protect himself from danger when required at the instance of either to make a levy.

His promise to levy, unless made in bad faith and with a view to enable the judgment debtor to dispose of his property that the other may be compelled to pay it, is a mere *nudum factum*, and no action can be maintained upon it. The sheriff believed that Boaz would pay the debt, and as evidence of that fact lost by reason of indulging him in the payment of other claims more than the amount of this judgment. No fraud is alleged on the part of the sheriff, or any conspiracy between him and Boaz by which the entire burden of payment was to be thrown upon the appellee.

In such a state of case a recovery might be had; or where the sheriff had seized the property and released it from the levy, or after the levy had permitted the property to be removed, the claim of the surety might be heard, but where no levy had been made the sheriff, notwithstanding a promise to make the debt out of one of the debtors, could have proceeded at once to make and enforce his levy upon the estate of the other. If the creditor before or after judgment had promised to make the debt out of one or the other of the debtors without any consideration for the promise it would not have been binding upon him. The surety, by paying the debt and obtaining an assignment from the creditor having the right to control the execution, could then have made the sheriff responsible; but in the absence of any control over the writ for a mere omission to make the levy no liability exists, although as between the common debtors the one who has secreted or removed his property may alone be liable. If the sheriff has seized the property, or permitted it to be removed after the levy, then the surety may complain; but prior to the levy the promise of the sheriff to levy, if made, is not obligatory unless it is followed by bad faith amounting to fraud or collusion between the debtor and the sheriff in order to subject the property of one to the payment of the entire debt. No such bad faith is established or relied on in this case.

Judgment *reversed* and cause remanded for further proceedings consistent herewith.

J. J. Landrum, R. B. Brown, for appellants.

N. T. Lindsay, Strother & Orr, for appellee.

THOMAS THOMAS, ET AL., v. JAMES CLARK.

Power of Chancellor After Rights Have Been Determined in a Court of Law.

Where issues have been formed between litigants, in which one is charged with trespass by removing a gate, and the issues have been determined on appeal, a chancellor has no power to modify the judgment rendered by the court of law.

APPEAL FROM GRANT CIRCUIT COURT.

October 26, 1880.

OPINION BY JUDGE PRYOR:

One of the complaints made by the appellants in the original action of trespass was the removal of the gate of the appellee and the obstruction of the passway so as to prevent its convenient use by the appellants. The court below rendered a judgment upon the verdict, in favor of the appellants, by reason of the trespass complained of, and that judgment was affirmed by this court. This must be held as concluding the rights of the parties, and the chancellor had no power to modify that judgment, for the reason alone that the removal of the gate or the acts of the appellee have in no manner interfered with the enjoyment of the easements by the appellants. That identical issue was tried in the common-law court. Besides, there is proof conducing to show that the erection of the gates at another and different place, by the appellee, has produced serious inconvenience to the appellants, and if the question had been made for the first time before the chancellor it is doubtful whether any ground existed for equitable relief. The enjoyment of the easement by the appellants is no doubt an interference with the appellee in the use and ownership of his own land; still, the easement is not only claimed, but established as a matter of right, and the chancellor should have dissolved the injunction. The gate should be located where it stood when the action of trespass was committed.

Judgment *reversed* and cause remanded for further proceedings not inconsistent with this opinion.

W. T. Simmons, J. J. Landrum, for appellants.

E. H. Smith, for appellee.

B. F. CROFOOT'S EX'R *v.* H. A. DUVALL.

[Abstract Kentucky Law Reporter, Vol. 1—348.]

Funeral Expenses.

Where the father of a married woman upon her death orders a burial outfit, and it is furnished and he is charged for the same, he cannot, by having the bill made out and presented to the husband of the deceased make such husband liable thereon to the undertaker. Such a claim was not the debt of the husband, unless he ordered the outfit or agreed to pay for it, and there can be no recovery against the husband in favor of the estate of the decedent's father where there is not in his petition any allegation that the husband promised to pay such claim.

APPEAL FROM JEFFERSON COURT OF COMMON PLEAS.

October 27, 1880.

OPINION BY JUDGE PRYOR:

There is a controversy between the executor of Frank Crofoot and H. A. Duvall in which the executor is asserting a claim against Duvall for money paid by Crofoot in his lifetime for a coffin in which was deposited the remains of his deceased daughter, the wife of the appellee. The case was twice tried, the jury having returned a verdict in the first trial that was set aside by the court and a new trial granted, and on the last hearing, the law and facts having been submitted to the court, a judgment was rendered for the appellee, Duvall. The executor complains and insists that the court erred in setting aside the verdict on the first trial, and also in rendering judgment on the final trial.

The instructions given on the first trial, if any, do not appear in the record, and we cannot say whether the court erred in granting the new trial by reason of erroneous instructions given, or because the evidence did not authorize the verdict. The appellee maintains that no bill of exceptions is in the record evidencing the facts declared on the first trial, and therefore the error, if any, committed by the court, cannot be considered. Waiving any answer on that question it is evident that the jury must have been misled by some improper ruling of the court, or no such verdict would have been rendered.

In the original petition it is alleged that the appellee was indebted to Smith for the value of the burial case, etc., and the appellant's testator purchased the account of Smith (the undertaker) for a full

and fair consideration, and the same was assigned to him; therefore Smith unites with the executor of Crofoot in asking a judgment for the amount, etc. There was no evidence supporting the verdict. Smith testifies that Duvall was not indebted to him for the amount of the account, and no credit had been given him for the articles furnished, but on the contrary that Crofoot, the father of Mrs. Duvall, had ordered the burial case and directed him to furnish what was necessary for the purpose of the funeral, and that he charged Crofoot with the account, the latter not only having created it but agreed to pay it.

Smith claims that when he presented the account Crofoot directed him to make it out in the name of Duvall and he would pay it. Duvall was insolvent and Crofoot possessed of considerable means. Smith, to get his money, made the account out against Duvall, and Crofoot at his own instance paid it off, and after his death his executor required Smith to assign the account to Crofoot. If this was Duvall's liability it was discharged by Crofoot in the absence of any request by Duvall to pay it, and no implied promise existed on the part of Duvall to repay to his father-in-law the money he had expended. But, as between Crofoot and Duval, it was not the debt of Duvall, but of Crofoot. The latter, knowing the pecuniary condition of his son-in-law, voluntarily assumed the payment of the account, and doubtless had no intention of making his son-in-law refund the money.

But it is said that the appellee promised the testator in his lifetime to pay this account in monthly installments, and therefore he is liable. No such promise is alleged in the original petition, nor was any amended petition filed relying on this promise until after the new trial had been granted on the first hearing. Therefore the court acted properly in granting a new trial for the want of testimony to support the verdict. On the last trial, the amended petition being in, it was proven by a witness (and perhaps the same proof was had on the first trial) that she was told by the testator to keep near himself and Duvall when the two were talking that she might hear what they were talking about, and in obedience to the wishes of the testator she was in the hall listening to what was transpiring between the two, and heard the appellee promise to pay the account in installments. Duvall denies that any such conversation took place, and the

court, disregarding the testimony (as should have been done), introduced to establish this alleged promise, dismissed the petition.

The judgment is *affirmed*.

Elliott & Atchison, for appellant.

Lane & Harrison, for appellee.

GEORGE A. HELM v. W. H. PAYNE, ET AL.

[Abstract Kentucky Law Reporter, Vol. 1—350.]

Sale for Taxes.

In a sale by the sheriff for delinquent taxes all the steps necessary to give such officer authority to sell must be shown, and any failure to comply with the law will be fatal.

APPEAL FROM WARREN CIRCUIT COURT.

October 27, 1880.

OPINION BY JUDGE PRYOR:

What amounts to a mere irregularity in a sale of land for taxes is the question involved in this case. It has never been held that a sheriff's conveyance to a purchaser must be upheld upon the legal presumption that the sheriff and those before him have discharged their duty in imposing the burden and in selling the property.

All the steps necessary to give a sheriff the authority to sell must be shown, and any failure to comply with the requirements of the law made for the protection of the owner's interest will prove fatal. 2 Cooley on Taxation, p. 911-915. In this case there is no description of the property with the amount paid by the purchaser or the purchaser's name returned to the clerk's office of the county court in the manner required by law. It does not appear that the property was properly assessed. It does not appear that a receipt was tendered the appellee for his taxes and payment demanded as required by the statute. All this must appear before the sheriff can sell or is authorized to sell, and the court, in the absence of a compliance with all these requirements for the authority to sell, acted properly in instructing the jury to find for the defendant.

Judgment *affirmed*.

J. M. Hines, J. H. Rose, Wright & McElroy, Bush & Porter, for appellant.

H. T. Clark, for appellees.

WESLEY HORN, ET AL., v. REBECCA MIZE.

[Abstract Kentucky Law Reporter, Vol. 1—350.]

Dower.

The allegation in an answer to a petition of a widow for dower, that she had received a thousand dollars' worth of property from her husband, constitutes no bar to her right of dower.

Allotment of Dower.

Where a widow is entitled to dower in five hundred acres of land purchased by three different grantees, who have each made valuable improvements on their land, proof should be taken of the value of the improvements made by each of the purchasers and of the value of the unimproved in the possession of each, and dower should be allotted so as to put an equal portion thereof upon the lands of each in proportion to the quantity held by each, in order that each may be made to contribute equally out of the land received by each according to its quantity and value.

APPEAL FROM LEE CIRCUIT COURT.

October 27, 1880.

OPINION BY JUDGE HARGIS:

The appellants, Wesley Horn, Thomas Horn and Sarah Stamper, are shown to have been purchasers for a valuable consideration of the tract of five hundred acres of land in which the appellee claims dower. The demurrer was properly sustained to the answer, so far as it sought to defeat appellee's claim of dower, because the naked fact set forth in it, that the appellee had received a thousand dollars' worth of property from her husband, constitutes no bar to her right of dower. But the answer was sufficient for the purpose of requiring the location of appellee's dower equally upon the lands of each of the appellants embraced by the boundary named in the appellee's petition. It is alleged by the answer that there is enough of the unimproved portion of the land to make up appellee's dower, and that there are valuable improvements made by appellants in different quantities upon their respective parcels.

The commissioners should have been directed not only to take proof of the value of the improvements made by each of the appellants, but of the value of the unimproved land in the possession of each, and to lay off appellee's dower so as to put an equal portion thereof, taking into consideration quality and quantity upon the lands of each of the appellants in proportion to the quantity possessed by

each, of the five hundred acres named in the petition, so as to make each of them contribute equally to the dower out of the land received by each according to its quantity and value. Gen. Stat. (1909), Secs. 2073, 2139.

It would be manifestly unjust to take the whole of the dower from the parcel of one of the appellants when they are all equally innocent. If the unimproved lands are insufficient for the purpose, then so much of the cleared lands on which there are no houses or orchards should be added to complete appellee's dower.

The exceptions should have been sustained to the commissioner's report of division. The evidence reported should remain before the court unless legal objection can be shown to it. The case should be referred to the master commissioner, or a special commissioner, with power to take any further testimony that may be offered by either party, and cause the survey to be made in his presence and under his directions in pursuance of the principles of this opinion. The commissioner's allowance should have been \$1.50 per day each, or not exceeding \$3 per day for both. The cost of the abortive division must be paid by the appellee.

The judgment confirming the commissioner's report and so much of the original judgment directing the commissioners to lay off dower so as to include the mansion, and appointing two commissioners instead of one commissioner, are reversed and the cause remanded for further proceedings not inconsistent with this opinion.

H. C. Lilly, for appellants. J. B. White, for appellee.

FARMERS' NAT. BANK OF MT. STERLING *v.* WILKERSON & JONES,
ET AL.

[Abstract Kentucky Law Reporter, Vol. 1—351.]

Acceptance of Note as Payment.

In a suit on a note where the defense is payment by the acceptance of another note, an instruction is erroneous where the jury is told that: "If they believe from the evidence that Henry Jones, Jr. (a defendant), paid and took up any part of the note in controversy they must find for the defendants a credit for the amount so paid." It was improper to leave the jury to decide what constituted payment.

Judgment, Notwithstanding Verdict.

A judgment cannot be lawfully demanded, notwithstanding the verdict, where the pleadings present an issue upon the merits and the testimony is conflicting.

APPEAL FROM MONTGOMERY CIRCUIT COURT.

October 27, 1880.

OPINION BY JUDGE HINES:

The only issue joined by the pleadings in this case is whether the appellant bank agreed to and did accept the note for \$250 with the interest paid thereon, of Jones, Jr., and Jones, Sr., as a payment *pro tanto* on the note declared on in the petition, with the condition that the remainder thereof should be secured by the copartner, Wilkerson, executing a note therefor and paying the interest thereon as Jones, Jr., and Jones, Sr., claim to have done.

By instructions two and three, taken together, the issue was fairly presented to the jury, and they were directed to find the facts from the evidence. We do not think that instruction No. 3 assumed the facts named in it to have been proven.

But instruction No. 1, in which the jury were told, "If they believed from the evidence that Henry Jones, Jr., paid and took up any part of the note in controversy they must find for the defendants a credit for the amount so paid" is abstract, too general, and not appropriate to the issue formed by the plea in this case. It was not proper to leave the jury to decide what constituted payment, as this instruction does. We would not reverse for the error indicated, but as the case must be reversed for other reasons we think it proper to point out the impropriety and hazard of this instruction.

Against appellant's objections the appellees were allowed to prove that Jones, Jr., had dealings before with William Mitchell as cashier, and got money on notes, and never knew of them being submitted to any board, and got the money when the notes were given. How such statements could throw any light upon the issue as presented we are unable to see. They do not establish a universal custom consented to by the bank, or prove that its cashier had any authority to accept the note left with him by Jones. What Mitchell did in other cases does not prove or tend to prove that he was unauthorized by the appellant to do so in this case, unless he is shown then to have acted within the scope of his authority, which was similar to that he exercised at the time Jones claims that appellant accepted the note.

As to the evidence of the insolvency of Jones, Sr., we think that was competent because it tended to fix a motive that might operate upon appellant in refusing to accept the note after the insolvency was known. It was also proper to allow appellees to prove that ap-

pellant got most of his property for the purpose of showing knowledge of his insolvency upon the part of appellant, but for nothing else.

The court properly overruled the motion for a judgment *non obstate veredicto* against Jones, Jr., and Jones, Sr., because there was no verdict rendered for or against them. It was the duty of the court to require the jury to render a verdict for or against them, or determine whether they could agree upon a verdict as to them.

This is not a case in which judgment can be lawfully demanded, notwithstanding the verdict, because the pleadings present an issue upon the merits, and the testimony is conflicting. Sec. 386, Civil Code; *Minor v. Kelly*, 5 T. B. Mon. 272. The jury were discharged without rendering a verdict between appellant and Jones, Jr., and Jones, Sr., and the case stands as if the jury had disagreed, announced it and were discharged.

For the errors indicated the judgment is *reversed* and cause remanded with directions to grant appellant a new trial, and for further proceedings not inconsistent with this opinion.

R. Reid, for appellant. W. H. Holt, for appellees.

A. Y. McAFFEE v. RURRACK & SMITH.

[Abstract Kentucky Law Reporter, Vol. 1—347, as *McAfee v. Rurrack*.]

Continuance to Secure Testimony.

There is no abuse of discretion in refusing a continuance of a trial to enable a litigant to secure evidence, where it is shown that the witnesses resided in a neighboring county; and the fact that notice was given, and the depositions of such witnesses were not taken because the witnesses desired the presence of plaintiff's assignor, does not show diligence such as is required.

Attorney's Lien.

After a suit in attachment is filed and an attachment is levied on the property, a lien by an attorney in a suit on a note is subordinate to the attachment lien.

APPEAL FROM JESSAMINE CIRCUIT COURT.

October 27, 1880.

OPINION BY JUDGE COFER:

There does not appear to have been an abuse of discretion in overruling appellant's motion for a continuance. The answer of appellee

to the cross-petition of the appellant was filed September 19, 1877. In that answer it was denied that his assignor was counsel for Moss in the suit against Merrill, and it was also denied that he had a lien on the land for his alleged fee as an attorney in that case. The cause was submitted in February, 1878.

The witnesses whose depositions were desired resided in a neighboring county. The fact that notice was given and the depositions were not taken because the witnesses desired the presence of the appellant's assignor does not show that there was such diligence as the law requires. Notice to take the depositions seems not to have been given until February 11. This was only a few days before the commencement of the term of court, and no reason is given for delaying the matter until so late a day.

On the merits there seems to be no serious difficulty. The fact that A. L. McAfee was attorney for Moss in the suit against Merrill having been denied, and not being proven, the appellant failed to establish an attorney's lien. If it be conceded that he acquired a lien in the suit on the note, that was after the appellee's suit was commenced and their attachment levied on the land, and the lien was therefore subordinate to the attachment lien, so that the appellant's case fails without reference to the question whether the appellees had a lien in virtue of their purchase under the execution in favor of Tilford.

Wherefore the judgment is *affirmed*.

William Lindsay, A. L. McAfee, for appellant.

J. S. Bronaugh, for appellees.

MATTHIAS MATTINGLY, ET AL., v. ELIZA E. WISEMAN, ET AL.

[Abstract Kentucky Law Reporter, Vol. 1—347.]

Husband and Wife—Wife's Property.

When the wife owns notes and the husband reduces them to possession and on their renewal had them made payable to himself by the wife's consent, it is sufficiently shown that the notes have become the property of the husband, and a promise of the husband to the wife made after he becomes the owner of the notes will not authorize the chancellor to divest the husband of title.

APPEAL FROM HARDIN CIRCUIT COURT.

October 27, 1880.

OPINION BY JUDGE PRYOR:

There is much testimony in the record of conversations between Christian Wiseman and his wife as to the conveyance of the land in controversy, all conducing to show a promise on his part to have the deed made to his wife. That the husband may have made such a promise is probable, and the weight of the evidence leads to such a conclusion; but when he made the promise, or the consideration moving him to make it, does not appear. It is true that the money or notes paid on the land came by his wife, and for that reason the wife insisted, and the husband, to gratify her wishes, agreed to have the deed made as she desired. When he reduced the note of Grohagen to possession and renewed it payable to himself by the consent of the wife, there was no agreement that he was to hold it for the wife or invest it for her use; but, on the contrary, its renewal to the husband by the direction of the wife conduces to show her desire that he should have it, and if not, the note became the property of the husband, and he had the right to dispose of it as he saw proper.

Conversations between third parties and the husband touching the property that he derived through his wife as to the disposition he intended to make of it ought not to be construed into a contract, or regarded as evidence sufficient to authorize the chancellor to take from the husband the money or personal property that the latter has reduced to possession and apply it to the benefit of the wife's children; nor can a promise to the wife made after the husband becomes the absolute owner authorize the chancellor to divest the husband of title. There never was any marriage contract between the parties, and the only proof of a promise made by Wiseman was his declarations made long after he had reduced the note of Grohagen to his use and after he had purchased the land and obtained a conveyance.

The court below acted properly in dismissing the petition and the judgment is *affirmed*.

A. B. Montgomery, James Montgomery, for appellants.

W. H. Chelf, for appellees.

JAMES MURPHY, ET AL., v. JAMES FRYER, ET AL.

[Abstract Kentucky Law Reporter, Vol. 1—348.]

Sale and Confirmation of Sale.

Where a sale of land is made during the life of the owner, but had not been reported or confirmed at the time of her death, the suit should be revived in the name of both the personal representative and heirs.

APPEAL FROM PENDLETON CHANCERY COURT.

October 27, 1880.

OPINION BY JUDGE COFER:

The order of revivor was not served on Mrs. Murphy, and as the title to the land sought to be sold seems to belong to her, all subsequent steps in the case are void.

At the time of Mrs. Fryer's death a sale had probably been made, but had not been reported or confirmed, and the suit should have been revived in the name of both the personal representative and heirs. The personal representative was a necessary party, because until the sale was confirmed there was a debt due to him; and the heirs were necessary parties before the sale could be confirmed because they were concerned in the question whether the report should be confirmed. The wrong tract of land seems to have been sold, and Mrs. Murphy being now before the court on this appeal, upon the return of the cause the personal representative should be permitted to come in and error in the judgment should be corrected.

The order confirming the sale and all subsequent orders and judgments are *reversed*, and cause remanded for further proper proceedings.

C. H. Lee, for appellants. J. H. Fryer, for appellees.

T. C. LAUGHLIN'S ADM'R, ET AL., v. OWINGSVILLE & MT.
STERLING TPK. CO.

[Abstract Kentucky Law Reporter, Vol. 1—348, as *Laughlin's Adm'r v. Orangeville and Mt. Sterling Tpk. Co.*]

Demand of Subscription from Personal Representative.

The object of the statute in requiring a demand to be made of a personal representative of a deceased subscriber to a turnpike company, before entering suit, is to give the representative an opportunity to pay and avoid costs. In order to entitle the claimant to payment the demand should be made under such circumstances as entitle claimant to the payment of the debt, and where a demand is made before payment is due it is not sufficient.

APPEAL FROM MONTGOMERY CIRCUIT COURT.

October 27, 1880.

OPINION BY JUDGE HARGIS:

The subscription to appellee did not become due until the company determined in what proportions and at what times they should be

paid. Forty-five cents on each dollar subscribed was ordered to be paid in different proportions prior to January, 1869. The payments thereof, it was determined by the company, should be made immediately, but as to the remainder, amounting to 55 per cent. of the stock claimed to have been subscribed by appellants' intestate, no order determinative or call therefor was made by the appellee until February, 1869, which was before the institution of this suit, but subsequent to the demand made of the administratrix. The administratrix refused to pay any of the subscription alleged to be owing by her intestate and late husband.

The appellee does not allege in its petition or any of the amendments thereto that the calls were made before the institution of the suit, which may be true, and yet the calls may not have been made long enough before its institution as to precede the demand. This was evasive pleading and therefore not bad. The appellant denies any knowledge or information of the making of the calls. In this state of the pleading, on the motion to dismiss the appellee's suit because a demand with affidavits required by law had not been made before it was brought, the burden of showing that the subscription was due lay upon the appellee. Appellee was the custodian and in the possession of the books of the company, and had every opportunity of proving the fact, if it was true. The appellant could not, without inspecting the books, know that the calls necessary to determine that the subscription was due and payable had been made, and she properly refused to pay 55 per cent. of the subscription when it was demanded, because that portion of it was not due according to the calls as shown by appellee in the progress of the trial.

The object of the statute in requiring the demand is to afford the personal representative an opportunity to pay the debt and avoid costs of a suit. But in order to entitle the claimant to payment of the debt the demand should be made under such circumstances as entitle the claimant to the payment of the debt. *Howard's Adm'r v. Leavell*, 10 Bush 481; *Trabue's Ex'r v. Harris*, 1 Met. 597.

Here it is clear that 55 per cent., or more than one-half, of the subscription was not due when the demand was made, and the appellee was not entitled to collect it until after it became due. If otherwise, the plea of the appellant, Nannie Laughlin, that the subscription was barred by limitation because it had been made more than fifteen years, is good, for if the subscription became due at all before the calls were made it became due as soon as it was subscribed, as no

other time for its payment is fixed by the contract. The evidence admitted against appellant's objections of the enhancement of the value of the lands of appellant, by reason of the location of the road, was calculated to induce the jury to render a verdict on the basis of an equitable settlement of the differences between the parties, rather than by the terms of the contract, and that evidence was therefore erroneous. We perceive no other substantial error in the proceedings. The instructions fairly presented the issues to the jury, except as to the amount of recovery, and gave the appellants the benefit of having all the issues and the facts relative thereto fully determined by them.

The court should have dismissed the appellee's petition for 55 per cent. of the stock without prejudice as to the administratrix, but not as to appellant, Nannie Laughlin, against whom the petition and amended petitions present a good cause of action for the whole amount of the subscription, and no demand of her was necessary.

Wherefore the judgment as to both appellants is *reversed*, with directions to award them a new trial and for further proceedings not inconsistent with this opinion.

C. Brock, T. Turner, W. H. Holt, for appellants.

R. Reid, for appellee.

SANFORD v. LOWENTHAL.

[Abstract Kentucky Law Reporter, Vol. 1—357.
Reported in Full, 5 Ky. L. 206.]

Diligence Required of the Holder of Collateral Security to Collect It.

The holder of collateral security is required only to use ordinary diligence and to act in good faith in his attempt to collect the collateral. Where he obtains a judgment thereon in a court having jurisdiction of the person and the subject matter in controversy, and has execution issued from that court, which is returned no property, he is shown to have exercised ordinary diligence.

APPEAL FROM BALLARD CIRCUIT COURT.

October 28, 1880.

OPINION BY JUDGE HINES:

Appellant complains that the court sustained a demurrer to the second and third paragraphs of his answer, and that the court did not, on the demurrer to the answer, consider the petition and de-

clare it defective. The defect claimed to exist in the petition is that it fails to show that appellee used proper diligence in attempting to collect the claims placed in his hands as collateral security, in that, as to a portion of the claims, judgment was obtained in a justice's court, and an execution from that court returned "no property". It is insisted that the judgment and execution should have been filed in the office of the circuit court, and an execution issued therefrom. Such a course might be necessary to establish legal insolvency, but no such diligence is required of one who holds paper or claims as collateral security. He is required only to use ordinary diligence, and to exercise good faith in his attempt to collect. This is an elementary principle, and requires no citation of authority to support it. To obtain judgment in a court having jurisdiction of the person and of the subject-matter in controversy, and to have execution issued from that court and returned "no property", is in itself sufficient evidence of ordinary diligence, which is all that is required in such cases as this. It does not alter the case that the receipt for the claims held as collateral stipulates that appellee is to use "due diligence" in collecting. Such a stipulation neither enlarges nor narrows the liability incidentally attaching to such a contract.

It is also insisted that the court erred in sustaining the demurrer to the second and third paragraphs of the answer, first, because of the form of the demurrer, and, second, because each of the paragraphs constitutes a defense to the action. The demurrer was: Plaintiff demurs to each of the paragraphs of the answer. It is insisted that this is not a special demurrer, such as is provided for by Sec. 92 of the Civil Code. This is undoubtedly correct, as it specifies none of the grounds for a special demurrer. It is also insisted that it is not authorized by Sec. 113, which provides that a party may demur to a part of a pleading and present an issue of fact as to another part. It is true that if the demurrer was in terms to the whole of the answer, on the ground that it did not state any defense to the action, it would not be well taken if any portion of the answer presented a defense; but it is also true that if the demurrer designated specifically the second and third paragraphs as defective because they did not state a defense to the action, it would be technically good, and it would be in derogation of the liberal spirit of the code to hold that the demurrer could not be considered because it was to each of the paragraphs, when any two out of the three were bad. The second paragraph of the answer admits that the judg-

ment was obtained on the Harp debt, and execution returned "no property" except as to a certain quantity of tobacco, which sold for \$5,117. The fact that appellant would have levied the whole amount of the debt for the tobacco if he had known of the sale does not affect the question.

No fraud or want of diligence is charged against the appellee on account of his failure to notify appellant of the time of sale. Appellee was required to do no more than to obtain judgment and cause execution to issue. The additional allegation in that paragraph that the defendant had, and owned at the time, a certain tract of land subject to execution is immaterial. Appellee was not required to make search for property to satisfy the debt. In the absence of any fraud or knowledge on his part he had a right to trust to the capacity and vigilance of the officer to subject any legal estate the debtor might have.

The third paragraph was not good for the reason stated in the first part of this opinion. Appellee obtained judgment on the claims then mentioned in a justice's court, and had executions issued which were returned "no property". If appellee could, under any circumstances, be required to have execution issued from the clerk's office of the circuit court on these judgments it is not certainly required of him when it is not made to appear that anything could have been thus reached to satisfy the debts.

Judge Hines delivered the following response to the petition for rehearing:

The error in the first is, we think, in assuming that the assigned notes were taken as collaterals.

The petition as amended alleges that the notes were received as collateral security; that the plaintiffs were to account for any excess they might collect over and above the debt held by them, and that they would not bring any other suit on the notes executed by defendant to plaintiffs before July, 1879, the plaintiff to use due diligence in the collection, and the defendant was to pay 1 per cent. for collection.

These allegations are not denied in the answer. That this was not a payment pro tanto is too clear to admit of discussion, and that the claims assigned were as collateral is equally clear. *Lee's Adm'r v. Smead*, 1 Met. 628; *May v. Quimby*, 3 Bush 96. The case of *Green v. Cummins*, 14 Bush 174, has no application whatever, be-

cause the assignee of the notes in that case took them in part payment, and not as collateral security.

What was said in the opinion in reference to the Harp debt was based upon the supposition that it was referred to in the second paragraph of the answer. In this we were misled by the record. We find on close examination that it is in the first paragraph and not reached by the judgment sustaining the demurrer. This, however, does not affect the conclusion that the judgment of the court below is correct.

Petition for rehearing *overruled*.

Nichols & Hawes, for appellant. W. M. Smith, for appellee.

[Cited, *Roberts v. Farmers' Bank*, 118 Ky. 80, 25 Ky. L. 2296, 80 S. W. 441.]

LOGAN COUNTY *v.* R. H. CALDWELL.

[Kentucky Law Reporter, Vol. 1—376.]

County Bonds to Aid Railroad Company.

Under the provisions of the Act of 1867, p. 371, and the amendment thereof of Acts 1868, p. 515, providing for the issuing of county bonds to pay a subscription to a railroad company, it is held that an election held to vote on the proposition is legal when ordered by the presiding judge of the county court without the other members of the court being called upon, and also that, under the provisions of the amendatory act which came into force two days before such an election was held, a bare majority of all the votes cast is sufficient to authorize the county officials to subscribe for stock in such railroad company and to issue the county's bonds in payment of the subscription.

APPEAL FROM LOGAN CIRCUIT COURT.

October 28, 1880.

OPINION BY JUDGE COFER:.

Section 19 of the charter of the Owensboro and Russellville R. Co. (Acts 1867, p. 75) reads as follows:

"That the county courts of Daviess, Ohio, McLean, Muhlenburg and Logan counties shall have power, and are hereby authorized to subscribe to the capital stock of said company in such number of shares as may be determined by said county courts respectively, and to levy upon the taxpayers of such counties respectively such taxes as may be necessary to pay the stock by them respectively so sub-

scribed; and said county courts may, if they shall deem it prudent, issue the bonds of said counties respectively, for the amount of stock subscribed, or any part thereof, said bonds to be in such shares and payable at such times as said county courts may determine upon. But before such stock shall be subscribed by said county courts, the said county courts shall submit to the voters of said counties the proposition to subscribe stock, and the amount thereof (to be suggested and fixed by the commissioners named herein in each of said counties), at an election to be held on the third Monday in April, 1867, in each of the counties aforesaid, due notice of which shall be given by the sheriffs of each of said counties by written advertisements, posted in each of the voting precincts thereof, for at least thirty days before said day of election; and said stock shall not be subscribed unless a majority of all the votes cast at said election be in favor of such proposition; and said county courts have power to appoint suitable and necessary officers to conduct such election, and to provide for the collection of the tax aforesaid, if a majority of the votes cast at such election is in favor of the proposition aforesaid."

By an act supplemental to the charter, approved March 8, 1867, (2 Acts 1867, p. 371) it was provided "That the provisions of an act to incorporate the Owensboro and Russellville Railroad Company be so extended that in the event that any county, mentioned in said charter, shall, from any cause, fail to vote on the proposition to subscribe stock by the county court on the day mentioned in said charter, then it shall be lawful for such county at any time thereafter to vote on such proposition: Provided, That the county court of such county shall comply with the provisions of said charter in causing thirty (30) days' notice to be given, and with the other provisions of said section of the charter."

Sections 3 and 9 of an act to amend the charter of the company approved February 5, 1868 (1 Acts 1867-8, pp. 435-6), reads as follows: "Sec. 3. That it shall be lawful for the county judge to subscribe stock in said company on the petition of a majority of the voters of said county being to the said county judge presented in the same manner as though a vote had been taken under the act to which this is an amendment; and it shall be lawful for the county judge of any county that may have voted a tax under the original act to subscribe such additional stock as a majority of the voters of said county may petition for, and bonds shall be issued for all sums so petitioned for. * * * Sec. 9. That whenever a majority of quali-

fied voters of any county, or precinct of any county, shall, either by vote or petition, instruct the county judge of the county or precinct so voting or petitioning to take stock in the Owensboro & Russellville Railroad Company, it shall be the duty of the county judge of said county to subscribe the amount so voted or petitioned for and issue bonds therefor."

At its December term, 1868, the county court of Logan county, the county judge alone being present and holding the court, ordered an election to be held at the several voting places in said county on the 27th of February, 1869, at which election there should be submitted to the voters this question: "Are you for or against a subscription by the Logan County Court of twenty thousand shares of twenty-five dollars each, to the capital stock of the Owensboro & Russellville Railroad Company, payable in the bonds of said county, having thirty years to run, and bearing interest at the rate of six per cent. per annum, and said amount to be expended in the construction of said railroad through the county of Logan?"

A vote was taken as ordered, and "the poll-books were duly certified and returned and were duly compared, the correctness of the summing up of the votes duly ascertained, and the result duly certified by John W. Caldwell, then judge of said county court, J. W. Winlock, then clerk of said court, and Sam Felts, then sheriff of said county, who made and returned their written certificate, signed by each of them, that at said election 1,306 votes were cast for said proposition, and 633 votes were cast against it, and that of all the votes cast there was a majority of 673 for said proposition."

By an order entered on the order book of the court at its March term, 1869, the county judge presiding, a subscription was made in conformity with the vote. Bonds signed by the county judge, attested by the clerk under the seal of the county and having interest coupons, signed by the clerk alone, attached, were subsequently issued and delivered to the railroad company in payment of the subscription.

The county court having failed to pay or provide for the payment of the coupons, maturing January 1, 1880, the appellee, being the owner and holder of seven of said coupons, brought this action against the county to recover judgment thereon. The county, without denying any of the foregoing facts, defended on two grounds, viz.: (1) that under the charter the county court, held by the county judge alone, had no power to order an election; (2) that the charter.

as it stood when the vote was ordered, only authorized a subscription to be made in the event that a majority of the legal voters of the county should vote in favor of such subscription, and that the votes cast in the affirmative were not a majority of the legal voters of the county at that time.

Counsel for the appellant maintained that under the charter, as it stood at the time the vote taken February 27, 1869, was ordered, no subscription was authorized upon a vote of the people unless a majority of the legal voters of the county should vote for it, and that it was a matter of discretion with the county court whether it would order a vote to be taken, and the case falls within the rule laid down in *Bowling Green & M. R. Co. v. Warren County Court*, 10 Bush 711. The county judge alone had no authority to order the election, and there was, therefore, no legal vote taken, and no authority was ever acquired by the county court to make the subscription which was made, or to issue the bonds now in suit in this case.

On the other hand counsel for the appellee contended that, as there were two methods provided in the charter by which the will of the voters in respect to the proposed subscription could be ascertained, one of which was wholly independent of the county court and was as effectual as a vote ordered by the court, and as the assent of a majority of the voters of the county was required whether the one or the other mode was adopted, the rule applied in the *Bowling Green and Madisonville* company's case does not apply.

The company's charter provided that whenever the said railroad company should request a county court "to subscribe either absolutely or upon specified condition, a specified amount to the capital stock of said company, the county court so requested may, in their discretion, order an election," etc.; and in the case against *Warren county* we held that the county judge sitting alone as the county court had no power to order a vote to be taken on the question whether a subscription should be made.

That case proceeded on the idea that, as the justices of the peace are, by law, part of the county court in levying the county levy, in making appropriations of money, and generally when the financial interests of the county are involved, it ought to be presumed, when a discretion is given by law to the county court in respect to a matter relating to the financial affairs of the county, that the legislature intended by the phrase "county court" that court to which it had by law committed the management of the general financial interests of

the county. It was said the question was one of importance to the people, on which they had a right to the judgment of those representing the various localities and interests of the county. That the legislature had in that instance departed from the usual course of legislation with reference to railroad charters was remarked upon, and, although the court did not say so in express words, a careful perusal of the opinion will show that the court regarded the fact that the matter of ordering a vote was submitted to the discretion of the county court as evincing the purpose of the legislature to place the parties, as it were, between the people and the railroad company, and for the protection of the people to require the assent of the justices as a condition upon which the people might be asked to incur a heavy pecuniary liability.

The charter under discussion in that case provided no mode of access to the people except through the county court, and the people had no power to impose upon themselves the proposed debit until the assent of the court was obtained, and hence the exercise of the discretion given to the court was an indispensable prerequisite, a condition precedent to any action by the people looking to a subscription to the stock of the company. That provision showed the legislature meant to require under any and all circumstances a concurrence of the judgment of the county court, and a majority of the voters voting at the election in any subscription that might be made, and that none should be made without such concurrence; and hence it was held that the legislature intended by the words "county court" a court composed of the presiding judge and justices—the representatives of the people of the various sections of the county—in all matters pertaining to county finances.

But we also said that if the discretion of the legislature had been imperative on the county court to order a submission of the question to a vote of the people, it would have been immaterial whether a court composed of the justices, or held by the presiding judge alone, made the order, as either or both must obey. We repeat, then, that the point on which that case turned was the clearly manifested intention of the legislature that no submission should be made under that charter without the assent of the county court and a majority of the voters voting on the question, and the assent of the court was required to be given before the voters could act at all in the matter.

Under the charter of the Owensboro and Russellville R. Co., as originally adopted, a like discretion was given to the county court,

and if there had been no amendment to it we might hold, as we did in the case of the Bowling Green and Madisonville company, although there are some grounds upon which the cases may be distinguished. But by the provisions of Section 3 of the Act of February 5, 1868, quoted *supra*, the legislature authorized the county courts to subscribe upon the petition of a majority of the legal voters of their respective counties, and, by Sec. 9 of the act, made it the imperative duty of the court to subscribe as directed by the petition, and in case of a vote it was made likewise imperative if a majority of the voters of the county voted in the affirmative. This shows that it was not the intention of the legislature to require the assent of both the county court and the people as an indispensable prerequisite to any subscription by a county. It would seem idle to suppose that the legislature meant to interpose the county court as a barrier to a subscription being authorized by vote without the previous consent of the court in order to secure to the people the benefit of the opinion and judgment of the court, when the legislature, at the same time and in the same act, placed it in their power to direct and compel the court to make the subscription, whether it approved the project or not. If the people desired to have the subscription made, and the court, on being applied to, refused to submit the question of subscribing to a vote, they might, by petition, accomplish their wish, despite the adverse views of the court. What reason could have induced the legislature, when authorizing a majority of the voters by petition to compel the court to make the subscription petitioned for, to require the assent of the court as a condition precedent to allowing a like number of voters by voting at the polls to require the subscription to be made? In the charter of the Bowling Green and Madisonville company the order of the court submitting to the people the question of subscribing was the only mode in which a subscription could be made, and was a condition, without which no subscription was authorized, however much the voters should desire to subscribe.

Under the charter of the Owensboro and Russellville company, the order submitting to a popular vote was one of two modes provided for ascertaining the will of the people. The fact that a mode was provided which was wholly independent of the county court, and much more liable to abuse and frauds, shows that the order of submission was intended merely as a means of ascertaining the popular will, and not as a condition precedent to a subscription; that the consent of the voters was the essential thing to be had; and that no

importance was attached to the opinion or judgment of the county court as to the propriety of subscribing for stock. As in the practical operations of the charter, the legislature seems to have attached no importance to the opinion of the county court as to the propriety of a county subscription, we cannot hold that the assent of the county court was a condition precedent to a vote and subscription. As we said in the case against Warren county, if the legislature had given the county court no discretion whether it would order an election, it would have been immaterial whether the court that ordered the election was held by the county judge alone, or was composed of the judge and justices; so we hold here that as the legislature has plainly manifested its intention not to make the right of the people to require a subscription to depend upon the discretion of the court, and to confer upon the people alone the power that was conferred under the Bowling Green and Madisonville charter upon the people and the county court jointly, it was immaterial whether the vote that was to ascertain the will of the people was made by the county court, held by the county judge alone, or by the judge and justices, as in either case it was the consent of the voters and the county court that the legislature intended should decide the question.

We recognize the rule that a statute conferring such powers must be strictly construed in all matters affecting the substantial rights of the taxpayers. But at most the county court, by which the vote was ordered, was not properly constituted, but it was still the county court.

The object in submitting the question through the county court was merely to ascertain, in a regular and orderly manner, the voice of the voters, which was made the controlling power, and whether the tribunal that ordered the vote was constituted precisely as intended or not, it was, at most, but an irregularity which in no manner reached or affected the voters or the result of the vote or the substance of the transaction. We are, therefore, of the opinion that the order of the county court, submitting the question of subscribing to the stock of the company to a vote of the people, was and is a valid order.

As we have heretofore stated, when the order for a vote was made the charter only authorized a subscription to be made in the event that a majority of the voters of the county should vote in favor of it. But two days before the vote was to be taken an act further to amend the charter became a law. That act amended section 6 of the

Act of February 5, 1868, quoted at the beginning of this opinion, so as to read as follows:

“That whenever a majority of the votes cast at any election held for that purpose shall instruct the county judge of the county or precinct voting, to take stock in the Owensboro & Russellville Railroad, it shall be the duty of the county judge of the county to subscribe the amount so voted for, and to issue bonds therefor: **Provided**, however, That this act shall not interfere with subscriptions by petition, as authorized in the act to which this is an amendment and the original act of incorporation.” (1 Acts 1868-9, p. 515.)

As a majority of the voters of the county did not vote in favor of the subscription, that vote did not authorize the subscription that was made, or the issuing of the bonds of the county to pay for it, unless the foregoing act is applicable. The vote was taken after the act went into effect, and, therefore comes within the terms of the act.

It is contended, however, that the legislature only intended it to apply to votes taken at elections ordered after it went into effect, and to apply it to a vote ordered before its passage and taken two days after its passage would make it operate as a fraud upon the voters; that the voters knew when the vote was ordered that the law provided that unless a majority of the voters of the county voted in favor of the proposed subscription it could not be made; that they knew that if they abstained from voting they would be counted as voting against it; and that the act of February, 1869, being passed only two days before the vote, the voters could not learn its provisions in time to enable them to vote against the subscription if they desired to do so.

But the language of the statute is plain and unambiguous. There is no room for construction. The act was in force when the election was held; it was held for the purpose of instructing the county court to subscribe for stock in the Owensboro & Russellville R. Co., and a majority of the votes cast were in favor of the subscription. The act declared that in that event it should be the duty of the county judge to make the subscription; and he acted in obedience to it and made the subscription and issued the bonds. The power of the legislature to pass the act has not been, and, in our opinion, cannot be successfully questioned. The legislature passed it, and, in language which does not admit of construction, applied it to the election held two days after its passage, and the courts have no power to annul or disregard it.

We are, therefore, of the opinion that the subscription bonds are valid, and the judgment of the court below to that effect is *affirmed*.

Judge Hargis dissenting.

Golladay & Lyle, C. M. Harwood, for appellant.

Browder, Browder & Caldwell, for appellee.

[Cited, *Feland v. Morton*, 10 Ky. L. 217, 8 S. W. 852.]

M. E. L. DAVIDSON, ET AL., v. ISHAM DAVIDSON'S ADM'R, ET AL

[Abstract Kentucky Law Reporter, Vol. 1—360.]

Sale of Land—Guardian Ad Litem.

A sale of land in which infants have an interest should not be ordered without the appointment of a guardian ad litem for such infants.

APPEAL FROM BARREN CIRCUIT COURT.

October 28, 1880.

OPINION BY JUDGE COFER:

It was error to confirm the report of the master and order a sale of the land without appointing a guardian ad litem for the infants. But the amended petition did not set up a new cause of action, and no summons was necessary, the defendants being already before the court. The widow claims that she did not get all the articles exempt by law from sale and distribution. If she did not, she should be compensated as far as the funds in the hands of the administrator will go toward that end.

It was not practicable to sell the remainder in the homestead for the payment of the balance of the purchase-money; nor have the widow and heirs a right to have that done. Enough land should be sold to pay the balance of the purchase-money, and the residue should be set apart as a homestead, and the remainder interest therein after the termination of the homestead may also be sold, if necessary.

Judgment *reversed* and cause remanded for further proper proceedings.

T. J. Doty, Rousseau & Smith, for appellants.

L. McQuown, for appellees.

CALVIN J. DARNELL, ET AL., v. MARY J. CRAIN'S G'D'N.

[Abstract Kentucky Law Reporter, Vol. 1—354.]

Will—Construction of Will.

Where it is provided in a will that the property of the testator shall go to his two children share and share alike, with a limitation over in the event they should die under the age of twenty-one years or without issue, it is held that if such children attain their majority their estate becomes absolute and indefeasible, although they may die thereafter without issue.

APPEAL FROM NICHOLAS CIRCUIT COURT.

October 28, 1880.

OPINION BY JUDGE HINES:

This action was instituted to obtain a construction of the will of Thomas M. Crain. The following provision only need be considered:

Fifth: "After my debts and the above bequests are all paid, then I will and bequeath the balance of my estate to my beloved children, Florence Angeline Crain and Mary Julia Crain, to be equally divided between them. It is not my intention to put anything in my will that will in any way operate against the interest of my two said children, or preventing them from having the full benefit of my estate when my two said children are each twenty-one years old. I want them to have the full use and control and benefit of what I have left them."

Sixth: "In the event of the death of either of my two said children, Florence or Mary, before they are twenty-one years old or without bodily issue, then I desire the survivor to receive all the benefits and provisions herein made for both; but in the event of the death of both of my said children before they are twenty-one years old or without bodily issue, then, in that event, if there is as much as three thousand dollars, etc., these last bequests are made, with the understanding on my part that in the event of both of my said children without bodily issue and there is as much as three thousand dollars on hand, but in the event of the death of both of my said children without bodily issue," etc.

In the case of *Thomas McClintock v. Daniel Thompson*, ante, p. 426, it is said by this court, Judge Hargis delivering the opinion: "Without attempting a review of the authorities it is sufficient now to say that, by a long list of the most eminent elementary and judicial

writers, the rule has been well settled that, if property be devised to 'A' with a limitation over, in the event he died under the age of twenty-one years or without issue, and if he attains his majority, his estate becomes absolute and indefeasible, although he may die without issue. In such cases the court, with a view to effectuate the intention of the testator, will read 'or' as 'and' ". That opinion distinguishes *Parrish v. Vaughan*, 12 Bush 97, from the case under consideration.

We see nothing in the case to take it out of the rule laid down in *McClintock v. Thompson*.

In the case now being considered an absolute indefeasible estate vested in Florence Angeline Crain and in Mary Julia Crain on their respectively becoming twenty-one years of age.

Judgment *reversed* and cause remanded.

W. P. Ross, for appellants. Thos. Kennedy, for appellee.

[Cited, *Truesdell v. Darnall*, 24 Ky. L. 2164, 73 S. W. 755.]

ANGELINE HACKNEY, ET AL., v. LOUISVILLE & N. R. Co.

[Abstract Kentucky Law Reporter, Vol. 1—357.]

Trespass.

It is not necessary that the owner of land should reside upon it to entitle her to maintain trespass against a railroad company for entering upon and building its road over it.

Evidence of Surveyor in Locating Land.

In a suit against a railroad company for trespass in appropriating one's land to build its road upon, it is error to exclude the evidence of the surveyor as to the survey which he had made. The plaintiff should have been allowed to identify the survey, and, if successful in this, he would be entitled to have it read in evidence as a part of the witnesses' testimony.

APPEAL FROM ROCKCASTLE CIRCUIT COURT.

October 28, 1880.

OPINION BY JUDGE HARGIS:

This action was brought by the appellants for trespass to the lands of the wife against the appellee, the Louisville & Nashville R. Co., averring that it had entered and constructed its road upon and across a tract of about fifty-two acres of land, which was in part the dower

of the wife in a former husband's estate, that the remainder of it belonged to her absolutely, and that the road continues the use.

The appellee did not deny building its road over the land described in the petition, but in legal effect denied that the appellants owned or had any valid deed to the land, or was living on it when the road was constructed, and averred that it had no notice of their claim, and no demand for compensation had been made by the company. It also averred that the right of way had been relinquished by appellants, but that the deed therefor had been burnt in the county court clerk's office of Rockcastle county, the records of which were burned in August, 1873. It will be seen by an examination of this pleading that it does not deny that appellants had control of the land at the time the company entered.

The appellee cannot justify or excuse the entry by the weakness or insufficiency of appellant's title. It is not necessary to live upon the land or have a valid deed therefor in order to maintain trespass against a mere wrongdoer. The control either with or without living upon it is enough. The parol evidence of the division and description of the dower as shown by the county court records before they were burnt was competent. The appellee omitted to offer any evidence of the existence or contents of the alleged but disputed relinquishment, which it avers was burnt in the same office where the division giving the female appellant dower was alleged to have been also recorded. The failure to offer such evidence may have been caused by a desire to sustain the untenable objections to the parol evidence offered by appellants of the contents of the records as to the dower, or because no such relinquishment had been made; and it may serve, as it seems to us, to show both reasons. It was error to exclude the evidence of the surveyor as to the survey which he had made. When appellants proposed to identify the survey by him they should have been allowed to do so, and, if successful, they were entitled to have it read as a part of the witness' evidence, as no surveyor could with any degree of certainty report from memory the calls and distances to such an extent as shown by the lines of this tract of land.

The only issues for the jury to try, as made by the pleadings in this case, were whether appellants had possession or legal control of the land, and the character of entry and extent of injury committed by appellee, or whether the relinquishment of the right of way had been given.

The judgment is therefore *reversed* and cause remanded with directions to grant appellants a new trial and for further proceedings not inconsistent with this opinion.

G. Pearl, for appellants. R. M. & W. O. Bradley, for appellee.

[Cited, *Hall v. Deaton*, 24 Ky. L. 314, 68 S. W. 672.]

SIDNEY SMITH *v.* D. H. SMITH, AUDITOR.

[Abstract Kentucky Law Reporter, Vol. 1—356.]

Compensation of Auditor's Agent in Collecting Taxes.

The act of February 20, 1864, took railroad companies out of the list of taxpayers who, under the law, were subject to be proceeded against by the auditor's agent to collect taxes, and hence the act of 1867 giving such agents a certain per cent. of moneys recovered on account of the collection of delinquent taxes gives such agents no authority to proceed to collect delinquent taxes from a railroad company.

APPEAL FROM FRANKLIN CIRCUIT COURT.

October 29, 1880.

OPINION BY JUDGE COFER:

The Act of January 23, 1864, Sec. 1, so far amended section 2 of the Act of February 28, 1862, as to embrace railroad companies and other corporations. Under these acts the auditor's agents would no doubt have had a right to proceed against a delinquent railroad company. Up to the passage of the Act of March 3, 1865, they would have had a right to the compensation given by section 5 of the Act of February 28, 1862. But the Act of 1865, Sec. 1, provided that he should not have any compensation for the performance of any act under the act approved February 20, 1864, to tax railroads, etc.

Until the passage of the latter act, railroad companies were liable to be proceeded against by the auditor's agent in the mode pointed out by the act creating that office and the various amendments to it. See *Louisville & N. R. Co. v. Commonwealth*, 1 Bush 250. But when the Act of 1864 was passed, providing for a different mode of assessing railroads and collecting the tax on them, railroad companies were no longer liable to be proceeded against for future delinquencies under the law relating to the auditor's agent, and it was no doubt for the purpose of avoiding all uncertainty on that subject that section 1 of the Act of March 3, 1865, was passed.

The Act of February 20, 1864, took railroad companies out of the list of taxpayers subject to be proceeded against by the auditor's agent. It left him no duties to perform in respect to the taxes of railroad companies, and therefore when it was declared in Sec. 1 of the Act of 1867 that he should have a certain per cent. of all the sums of money which he should thereafter cause to be recovered and paid into the treasury, "under the law creating said agency and acts amendatory thereto", reference was made to sums collected from persons against whom he had a right to proceed in the manner pointed out by the law creating his office to cause them to pay their taxes, and not to railroad companies, who, though delinquent, could not be proceeded against under the law relating to the auditor's agent.

Wherefore the judgment of the circuit court is *affirmed*.

J. & J. W. Rodman, A. Duvall, William Lindsay, for appellant.

T. E. Moss, for appellee.

J. B. DANERZAC v. RUDOLPH WURLITZER & BRO.

[Abstract Kentucky Law Reporter, Vol. 1—359.]

Rent Contract for Use of Piano.

A contract to rent a piano with the right of purchasing at a fixed price is not a contract of sale, and in such a contract no title to the property passes.

APPEAL FROM KENTON CIRCUIT COURT.

October 30, 1880.

OPINION BY JUDGE PRYOR:

The writing evidencing the agreement between the appellee and Mrs. Highbee shows a renting and not a sale of the piano. The latter had the right to purchase but no sale was consummated, and the quarterly installments to be paid is expressly stated to have been for the mere use of the instrument, and no such exorbitant price paid as manifested any other intention.

In the case of *Green v. Martin* the price of the piano was \$500, and one month's rent \$400 and that sum actually paid. That it was a sale was manifest from the writing itself, although the parties termed it a renting, while in the case before us no such conclusion can be drawn from the contract. It was a renting with the privilege

of purchasing at a fixed price, and no title passed to Mrs. Highbee except the mere use and possession. That the appellant did not authorize the order or a delivery of the property cannot now affect the rights of the parties. The plaintiffs could have instituted an action for the property itself without an order of delivery, and having obtained a judgment establishing their title it must now be enforced.

Judgment affirmed.

M. L. Roberts, for appellant.

Benton & Benton, John L. Furber, for appellees.

W. H. BALDOCK *v.* JANE RICHARDSON, ET AL.

WILLIAM DODD *v.* SAME.

[Abstract Kentucky Law Reporter, Vol. 1—359.]

Wills—Construction of Will.

Where a testator gave the residue of his estate after the payment of his debts and the payment of certain legacies to his wife during her life, and directed that at her death all he had received by her should go to her children, and the "balance of his estate, if any be left at her death, to be equally divided between his own brothers and sisters," the word "balance" means that which shall remain after deducting that which he gives to his wife's children. The widow was given only a life estate in the land, and the remainder can not be subjected to her debts.

APPEALS FROM GARRARD CIRCUIT COURT.

October 30, 1880.

OPINION BY JUDGE COFER:

The testator gave the residue of his estate remaining after the payment of his debts and the legacies to Mrs. Hicks and her brother, Israel, to his wife during life, and directed that at her death all he had received by her should go to her children, and the "balance of his estate, if any be left at her death, to be equally divided between his own brothers and sisters."

The "balance" referred to in that part of the clause quoted is that which shall remain after deducting that which he gives to his wife's children. It is as if he had said: "Out of the residue of my estate remaining at my wife's death, I give her children all I received by her, and the residue of my estate, if any, to be equally divided between

my brothers and sister." The widow has only a life estate in the land, and the remainder cannot be subjected to her debts.

There is nothing in the opinion in *Taylor v. Byers* inconsistent with this conclusion. The question in that case was not what estate the widow took, but was whether the devisees in remainder took a vested or contingent estate. In this case the testator had considerable surplus personal estate and a number of slaves, all of which he gave to his wife for life. This, in the then condition of affairs, would have given his widow an ample support, and goes far to fortify the conclusion that he did not intend that his real estate should be sold or encumbered for her support, and is sufficient to distinguish this from the case of *Logan v. Smith*, 2 A. K. Marsh. 52.

Judgments affirmed.

Dunlap & Dunlap, for appellants.

HENRY A. SELF v. MATTIE SELF.

[Abstract Kentucky Law Reporter, Vol. 1—356.]

Husband and Wife—Divorce for Abandonment.

When a husband seeks a divorce on the ground that his wife has abandoned him, he is required to prove facts showing such abandonment, and that it was her duty to return to him. Witnesses in such a case should state the circumstances and not their mere opinions that the wife abandoned the husband.

APPEAL FROM FAYETTE CIRCUIT COURT.

October 30, 1880.

OPINION BY JUDGE COFER:

The evidence of the alleged abandonment is in the most general terms. The witnesses say the appellee abandoned her husband, but not a single fact as to the cause or alleged cause, or the circumstances of the abandonment, is proved. The parties seem to have been boarding when the supposed abandonment occurred.

The reading of the depositions impresses the reader with the idea that something is withheld. But whether such be the fact or not, the witnesses should have been asked for facts and not for opinions. The person at whose house the parties had been boarding, as well as the brother of the appellant, says the appellee abandoned him; and the former says he did not see any just cause for her to do so. This im-

plies that there may have been something which the appellee regarded as just cause, and if the witnesses had been asked to state the circumstances under which the separation took place it may be that the court would have been of the same opinion.

It is not shown that the appellant made any effort to induce her to return, nor that he had either a home or a boarding place to which she could have returned. It was his duty to show such facts as made it her duty to return to him. In this he has wholly failed. Under such circumstances it is the duty of the chancellor to refuse to grant a divorce.

The law, for wise purposes, has required a party seeking a divorce to make out his case by evidence, and when abandonment is made the ground for the application it is necessary to show that the abandonment was without the fault of the plaintiff, and that the defendant was in fault in not resuming the marital relation.

That was not done in this case, and the petition was properly dismissed.

Judgment *affirmed*.

J. H. Webster, for appellant.

R. L. WHITE & CO. v. JOEL WILDER, ET AL.

Homestead—Sale and Reinvestment.

The owner of a homestead may sell and reinvest in another homestead which will be protected from creditors the same as the first.

Removal from Homestead.

Where the intention to return to a homestead at some future time will protect it from creditors, the intention must be made definite and certain and it must be a continuing one; and when it once ceases there is an abandonment, and no resumption of the intention will reclaim the right to the homestead.

APPEAL FROM WHITLEY CIRCUIT COURT.

November 4, 1880.

OPINION BY JUDGE HINES:

The owner of a homestead may sell and reinvest in another homestead which will be protected from creditors as the first; but whether the facts in this case, if there was a homestead in the appellee at the time he sold his land, would authorize the court in holding that the

land purchased with the money for which the land was sold, it is not necessary to decide. *Lear v. Totten*, 14 Bush 101.

The land for which the debt in controversy was created in 1874, and the land claimed as exempt, was purchased in 1875, but appellee claims that the payments were made out of the moneys received by him from the sale of a homestead, and that as the land in controversy is "a successor of the homestead sold by him" it cannot be subjected. It appears that appellee was in 1869 a bona fide housekeeper with a family, owning and occupying a tract of land of the value of about \$900. In that year he moved to the town of Williamsburg, for the purpose of educating his children and engaging in the sale of drugs, leaving upon his farm stock and farming implements, etc. It appears that some time after appellee moved to Williamsburg, whether before or after the creation of the debt does not appear, nor is it material, the houses on the farm from which he removed were burned.

Appellee, in reference to this removal, says: "I only intended to leave temporarily when I left the farm and moved to town to educate my children, and intended to return to the farm, until my houses were burned." In 1874 appellee removed to Pine Knot. In reference to this removal appellee says, in his deposition, "went to Pine Knot to make money. I had some idea if the place prospered and come to be a business place and my family were satisfied, to stay there, but I never settled there permanently." But while at Pine Knot appellee bought a lot and erected a house on it, and occupied it.

From these and many other statements in the deposition of appellee it is manifest that he did not, even at the time of removal from his farm, have any fixed or settled determination to return to it and make it a home for the future. But even if he then had such intention he abandoned it when he moved to Pine Knot, where he intended to remain if the place prospered, and when he purchased and built. Even where the intention to return to a homestead at some future time will protect it from creditors, the intention must be made definite and certain. It must be a continuing intention. When the intention once ceases, and that fact can be made manifest, there is, eo instanti, an abandonment of the homestead, and in such case there can be no resumption of the intention so as to operate as a reclamation of the homestead. It is as if there never had been any occupancy, and to reclaim it there must be a new, actual occupancy, from which date the homestead may reattach. The evidence of the appellee himself clearly shows that if there was such an intention to return

to the premises as would protect them, the subsequent intention not to return except upon the condition that Pine Knot was not prosperous, was an absolute abandonment of the original homestead. Upon this point there is no such question as weight of evidence. It is conclusive that there was an abandonment of the homestead, and that the court erred in dismissing the petition of appellants.

No objection was made by demurrer or otherwise to the pleadings, and while technically they are not good they are, in substance, sufficient. They are treated as having tendered substantial issues that were heard and determined by the court, and it is now too late to raise objections that do not reach to the merits of the controversy.

Judgment *reversed* and cause remanded for further proceedings consistent with this opinion.

C. W. Lester, J. C. Watkins, for appellants.

John Smith, R. D. Hill, for appellees.

THE UNION BETHEL CHURCH OF NEWPORT, ET AL., *v.* THOMAS
G. GAYLORD.

[Abstract Kentucky Law Reporter, Vol. 1—403.]

Judicial Sale of Church Property.

Where a deed to church property provides that it shall revert to the grantor or his heirs in case any of the conditions therein specified should be violated, where one of the conditions is that the church shall "forever remain free to all persons, and most especially to the poor, to worship God," and on petition of the church it is ordered sold by the court to pay debts, the grantor, if not a party to the suit to sell, can recover the property from the purchaser at such sale; but when he is a party to the suit and assents to the sale he is bound by it, and cannot so recover it.

APPEAL FROM CAMPBELL CIRCUIT COURT.

November 6, 1880.

OPINION BY JUDGE COFER:

In their original petition the appellants sought the sale of the whole property, in case it should be necessary to sell all, in order to pay the debts of the church; and in their amended petition they asked that the trust should be closed, the property sold, and the proceeds, after paying debts and costs, should be distributed among

those who had contributed to the erection of the church edifice. The chancellor ordered the sale as asked, but made a different disposition of the proceeds of the sale from that desired by the appellants, and they now ask this court to decide that the chancellor erred in decreeing the sale.

This novel proposition seems to be based upon the statute which declares that "No charity shall fail for the want of a trustee," etc. (Chap. 13, General Statutes); and it is contended that when these appellants abandoned the trust and sought its destruction, it was the duty of the chancellor to proceed, unasked by any one, to appoint other trustees or to disregard the prayer of the appellants, and to refuse to sell the property. This court is now asked, by the same parties who asked the chancellor to render the judgment, to reverse it. The statement of the proposition would seem to be a sufficient answer.

It is next insisted that the court erred in adjudging the proceeds of the sale to the appellee instead of applying them to pay the debts of the church. The deed conveyed the lots on which the church was erected for certain uses, and provided that the property should revert to the grantor or his heirs, in case any of the conditions therein specified should be violated. One of the conditions is that the church shall "forever remain free to all persons, and most especially to the poor, to worship God."

The appellants prayed for a sale without limitation or restrictions as to the uses to which the property should be applied by the purchaser. The sale, therefore, totally destroyed the uses prescribed in the deed. The property no longer remains free to all persons to worship God in or on it. No one but the purchaser now has that right.

The grantor was a party to the suit and assented to the sale, and therefore is bound by it. But if he had not been a party, and had given no consent, it will be hardly doubted that he could have recovered the property from the purchaser the moment the sale was confirmed, because the sale terminated the use declared in the deed, and brought about one of the contingencies on which the title was to revert, and all that would have remained was the election of the grantor to enter for condition broken.

The case differs from those in which there was a voluntary conveyance for charitable uses without a stipulation in the instrument of conveyance for the reversion of the title in case of the abandonment of the use. In such cases the title reverts by operation of law. But

in this case it reverts by operation of the deed upon a re-entry, for condition broken or other election to treat the title as forfeited.

In the former class of cases it may be that a grantee, abandoning the use after placing valuable improvements on property vacant when the conveyance was made, would have some equitable claim to compensation out of the property or its proceeds, from the enhanced value resulting from the improvements, especially if the conveyance was made in contemplation that such improvements would be made. The circumstances would, in such cases, present strong equitable considerations for the interposition of the chancellor. The grantor relying upon the law to reinvest him with the title, equity might compel him to make some compensation for improvements. But a grantor who stipulates in his deed that the title shall revert upon a violation of its conditions is not in a condition to be put upon terms. The circumstances under which the title shall revert having been made the subject of stipulation between the parties, the court must presume that no other terms were intended by them.

That the grantor covenanted against encumbrances, when there was a lien for a comparatively small amount of purchase-money due to his vendor, might have furnished some equitable ground for compensation for improvements, if the sale had been rendered necessary by that encumbrance. But such was not the case. The appellants sought the sale to pay the debts of the church, and made the remote vendor a party, and called upon him to assert his lien apparently for the purpose of passing an unencumbered title to the purchaser.

Nor do we perceive that the appellee is in any way responsible for the condition in which the appellants are placed. He gave them the lots, which cost him \$8,000 less \$1,880, and \$9,000 in cash to buy material for erecting the building, and, had not financial ruin overtaken him, would no doubt have continued to aid them with the same liberality that had characterized him as long as he was able to give.

Mrs. Ross' property is in mortgage, or her lease sold, for a debt created for the benefit of the church, "but the faith of the trustees and of the congregation stood pledged to her, to save her harmless," and we cannot doubt but that they will religiously keep their plighted faith. But whether so or not, the appellee's property has not been pledged to her in any way, and this court has no power to appropriate it to redeem the plighted faith of the "trustees and congregation."

A statement in a former judgment, that the property was liable in the hands of the trustees for the indebtedness incurred about the

erection of the improvements, was not a disposition of the surplus remaining after satisfying Gaylord's lien. It was merely the opinion then entertained by the judge which he had a right to change at any time, and it was not until the fund was ordered to be distributed or disposed of that the utterances of the court in respect to it became final.

We are, therefore, of the opinion that there was no error in adjudging to the appellee the proceeds of the sale of the property, and the judgment is therefore *affirmed*.

F. M. Webster, J. R. Hallam, for appellants.

Fisk & Fisk, for appellee.

LAFAYETTE SPROUL v. DAVID REED.

[Abstract Kentucky Law Reporter, Vol. 1—407.]

Variance in Petition and Proof in Slander Suit.

The rule in slander is that words spoken must be proven substantially as they are laid. Equivalent words of slander will not do.

Variance.

When it is charged in a petition for slander that: "Dr. Sproul signed my name and the name of Richard M. Coulter to a note to Dr. Flanagan for the sum of two hundred dollars. I never saw the note. He signed it without my authority and without the authority of Coulter," there is a fatal variance when the proof shows that: "Reed said he had never seen or signed such note, and if Flanagan held such note with his name to it his name had been forged either by the plaintiff, Sproul, or some other person, that said note was a forgery."

APPEAL FROM CASEY CIRCUIT COURT.

November 6, 1880.

OPINION BY JUDGE HINES:

The only question is as to whether there is a fatal variance between the allegation of the slander in the petition and the proof adduced on the trial.

The only actionable words in the petition are: "Dr. Sproul signed my name and the name of Richard M. Coulter to a note to Dr. Flanagan for the sum of two hundred dollars. I never saw the note. He signed it without my authority and without the authority of Coulter." The words proved as stated in the bill of evidence are:

"Reed said he had never seen or signed such note, and if Flanagan held such note with his name to it his name had been forged either by the plaintiff, Sproul, or some other person, that said note was a forgery."

The rule is that words must be proved substantially as they are laid; it is not enough to prove words of the same effect or import, or conveying the same idea; the words must be substantially the same words, and it is not sufficient that they contain substantially the same charge, but in different phraseology; equivalent words of slander will not do. This rule is endorsed in *Hurdt v. Courtenay*, 4 Met. 139. Applying it here, it is manifest that the variance between the allegations and the proof is fatal, and that the court properly instructed the jury to find for the defendant.

George Denny, Jr., T. Z. Morrow, for appellant.

Stone & Hays, for appellees.

[Cited, *Tharp v. Nolan*, 119 Ky. 870, 27 Ky. L. 326, 84 S. W. 1168.]

S. F. THOMPSON, ET AL., v. J. B. CALLINGS.

[Abstract Kentucky Law Reporter, Vol. 1—402.]

Levy of Attachment—Lien.

When an attachment has been placed in the hands of the officer, and is levied, the attachment lien was perfected and it relates back to the time when the attachment came to the officer's hands.

APPEAL FROM SPENCER CIRCUIT COURT.

November 6, 1880.

OPINION BY JUDGE COFER:

The acts set up in the original petition, and those relied upon in the amended petition, it seems to us, constitute distinct causes of action. The act which was relied upon in the original petition as within the statute was the payment of money to the bank, while the act relied upon in the amended petition was the delivery of wheat to J. A. Vesch and James Tucker to indemnify them as sureties to the bank. They were the persons preferred, according to the facts as finally developed, while the bank was the creditor preferred according to the facts alleged in the original petition. The preference to them operated incidentally to prefer the bank, but it is evident the

main purpose was to prefer J. A. Vesch and James Tucker, and not the bank, which we are authorized to assume was already secured. The amended petition was not filed until more than six months after the delivery of the wheat, and therefore came too late.

The payment to the bank was made after appellants' attachment had been placed in the hands of the officer, and when levied the lien was perfected and related back to the time when the attachments came to the officer's hands.

Wherefore the judgment is *reversed* and cause remanded with directions to pay the appellants in full before distributing to other creditors any part of the proceeds of the attached property.

Caldwell & Harwood, for appellants.

Bullock & Beckham, for appellee.

ROBERT E. PAGUE, ET AL., v. OTTUMWA & K. R. Co.

[Abstract Kentucky Law Reporter, Vol. 1—399.]

Appeals.

An appeal will lie from a judgment vacating a judgment and granting a new trial.

Service of Process on Agent—Jurisdiction.

When it is shown by the evidence that the person on whom the summons was served as agent of another, and upon which service the judgment is rendered, was not at the time and never had been the agent of the defendant, such judgment is not binding on such defendant, the court not having jurisdiction to render such a judgment.

APPEAL FROM LEWIS CIRCUIT COURT.

November 9, 1880.

OPINION BY JUDGE HINES:

An appeal lies in this case from a judgment vacating a judgment and granting a new trial under Secs. 518 and 520 of the Civil Code. *McCall v. Hitchcock*, 7 Bush 615, second appeal, 9 Bush 66.

All the assignments of error resolve themselves into one. The evidence heard was not sufficient to authorize the court to grant a new trial. It is sufficient to say that the person on whom the summons was served as agent of appellee, and upon which service the judgment vacated was rendered, testified that he was not and never had

been the agent of appellee. There was no other evidence sufficient to outweigh this positive and unqualified statement.

Judgment *affirmed*.

Roe & Roe, for appellants. Thomas W. Mitchell, for appellee.

[Cited, *Asher v. Cornett*, 126 Ky. 569, 104 S. W. 347.]

KENTON FURNACE R. CO. *v.* JAMES LOWDER.

[Abstract Kentucky Law Reporter, Vol. 1—399.]

Peremptory Instruction.

Where there is conflict of evidence as to where the boundary line between real estate in controversy ran, it is error for the court to instruct the jury to find for the defendant.

Admission of Evidence.

It is error to admit in evidence a judgment, deed and execution in another case, when at the time of the levy and sale the land in controversy was in the adverse possession of appellee, such sale being void.

APPEAL FROM GREENUP CIRCUIT COURT.

November 9, 1880.

OPINION BY JUDGE HINES:

The court below erred in admitting in evidence the judgment, execution and deed in the case of *Domain & Co. v. Kenton F. R. Co.*, because at the time of the levy and sale the land in controversy was in the adverse possession of appellee and therefore the sale was absolutely void. Sec. 2, Chap. 11, Gen. Stat.

As there was a conflict of evidence as to where the line ran between lots No. 5 and 10, it was error in the court to instruct the jury to find for the defendant. The instructions given in the first instance were substantially correct, except No. 5, which is erroneous for the reason indicated in the first paragraph of this opinion.

Judgment *reversed* and cause remanded for further proceedings.

B. F. Bennett, W. H. Wadsworth, for appellant.

E. F. Dulin, for appellee.

KENTUCKY NATIONAL BANK v. BANK OF LOUISVILLE.

[Abstract Kentucky Law Reporter, Vol. 1—400.]

Mortgage to Secure Pre-existing Debt.

Where a mortgage is executed by a corporation to its president to secure him in his future indorsement of the corporation's paper, and to enable it to continue to conduct its business and secure money for that purpose, and a note of \$3,000 held by the bank, upon which the mortgagee is surety, evidencing a debt of the corporation existing prior to the mortgage, is presented for payment, \$500 paid thereon, and the mortgage shown to the bank, and it thereby induced to accept a renewal for the remainder of the debt, such renewal note is secured by such mortgage, and the mortgagee is estopped by the representations made to the creditor at the time of the renewal of the note, on the faith of which the bank was induced to renew it and give further time, to controvert its right to resort to the mortgage as security for the note.

APPEAL FROM LOUISVILLE CHANCERY COURT.

November 9, 1880.

OPINION BY JUDGE COFER:

The Hackett Mfg. Co., desiring to borrow money, executed a mortgage to J. C. Metcalfe, who was expected to become its surety and endorser. The mortgage recites that: "Whereas, the Hackett Manufacturing Company wishes and expects to borrow, for use in its business, divers sums of money, not exceeding thirty thousand dollars, with the aid of Dr. J. C. Metcalfe, as its endorser or surety, it hereby conveys to him two lots," describing them.

The defeasance is in these words: "But if said company shall pay all notes and bills of exchange, not exceeding thirty thousand dollars, for which said Metcalfe may become liable as its endorser or surety for money borrowed by it during one year next after the date of this conveyance, or all notes or bills of exchange upon which he may become liable for the purpose of renewing or paying in whole or in part liabilities so incurred by him, and shall save him harmless from any liability so incurred, this conveyance shall become void." The mortgage is dated July 10, 1875.

At the time of the execution of the mortgage the Hackett company was indebted to the Bank of Louisville in the sum of \$3,000, evidenced by note on which Metcalfe was bound as surety. The note matured August 2, thereafter, and upon being applied to the bank refused to allow the note to be renewed, but upon being in-

formed of the mortgage by Metcalfe, who was president of the company, and being assured that the payment of the renewal note would be secured by it, the bank consented to accept a payment of \$500, and a new note for the balance, the amount for which Metcalfe was then bound being represented to be greatly less than \$30,000.

Prior to that time the Company had borrowed \$10,000 on other paper endorsed by Metcalfe and now held by the Kentucky National Bank. The mortgage property having proved insufficient to pay both banks, the sole question presented in this appeal is whether the debt due to the Bank of Louisville is secured by the mortgage. It is contended that it is not, because the language of the mortgage only applies to debts for money thereafter borrowed, for which Metcalfe should become liable as surety or endorser, and that the note to the Bank of Louisville is for a part of a pre-existing debt and not for money borrowed after the mortgage was made.

On the other hand, it is contended that the execution of the new note was practically a borrowing of that amount of money with which to pay the old note; that the mortgage was made to raise money to be used in the business of the company; that the payment of its debts was necessary to preserve its credit and to enable it to carry on business, and that it is immaterial what the form of the transaction was.

The circumstances under which the new note was executed were these: The bank was applied to to permit the note to be renewed. This was declined. Metcalfe then exhibited the mortgage to the president of the bank and proposed to him that the bank should discount a note for \$2,500, the proceeds to be applied to take up the old note, telling him that the note for \$2,500 would be perfectly secure, as it would be covered by the mortgage. Relying upon this the bank accepted the new note and applied the proceeds toward paying the old one.

Whether this was technically lending money and the creation of a new debt, as held in *Castleman v. Holmes*, 4 J. J. Marsh. 1; and in *Letcher v. Bank of Commonwealth*, 1 Dana 82, or the mere giving of new evidence of an old debt as held in other classes of cases, we do not deem it very material to inquire. Having regard to the purpose for which the mortgage was executed, and the circumstances under which the note was given and accepted by the bank, we think it is secured by the mortgage.

The chancellor will look to the substance rather than to the mere

form of transactions. The purpose was to provide money to be used in the business of the company. It was necessary that its debts should be met, and if the form of discounting the note and passing the money over the counter of the company had been gone through and the money immediately handed back in payment of the old note, all would admit that the note would be secured by the mortgage. This is, in substance, what was done, and accomplished all that would have been accomplished if there had been a formal lending and borrowing.

Moreover, the mortgage is not made to the appellant. Metcalfe is the only mortgagee, and whatever rights the appellant has under it is derived through him. He would be estopped by the representations made to the president of the bank, on the faith of which the bank was induced to renew the note and give further time, to controvert its right to resort to the mortgage as security for the note; and it may well be questioned whether the appellant, who is compelled to come into a court of equity to be subrogated to the rights of Metcalfe, has any greater right in this respect than he would have.

Wherefore the judgment is *affirmed*.

Barr, Goodloe & Humphrey, for appellant.

Hamilton Pope, for appellee.

JAMES CONOVER v. WILLIAM CONOVER'S ADM'R.

[Abstract Kentucky Law Reporter, Vol. 1—398.]

Motion for New Trial.

The particular errors complained of must be pointed out by the grounds for a new trial, or they will not be noticed on appeal by the court of appeals.

Assignment of Errors.

The rule that errors complained of must be specified with particularity is well established, and will be followed by the Court of Appeals.

APPEAL FROM OWEN CIRCUIT COURT.

November 9, 1880.

OPINION BY JUDGE COFER:

The particular errors complained of must be pointed out by the grounds for a new trial, or they cannot be noticed by this court.

The fact that but one ruling of the court in the course of the trial appears to have been excepted to does not alter the rule. This court cannot undertake the task of critically examining a record to see how many rulings were excepted to. The rule that the errors complained of must be specified is plain and well established; it may be followed without difficulty, is necessary to the convenient and prompt dispatch of the business of the trial courts as well as of this court, and must be strictly adhered to.

The jury and the circuit judge heard the evidence, and the jury were authorized by the relation of the parties and the circumstances in evidence to find that the appellant did not expect to be paid, and that his father did not expect to pay him, and the law is that in such cases no recovery can be had. *Weir v. Weir's Adm'r*, 3 B. Mon. 645; *Perry v. Perry*, 2 Duv. 312.

The facts in this case are not really so strong against the right of recovery, as in the cases supra, but there was enough in them to authorize the jury to find that there was no expectation on the part of either party that the appellant was to be paid for the services rendered for his father when he had become old and measurably disabled to attend to business.

Judgment affirmed.

Hallam & Gordon, for appellant.

J. W. Green, A. P. Grover, H. P. Montgomery, for appellee.

JAMES M. RICE'S ADM'RS, ET AL., v. D. S. HOUNSHELL.

[Abstract Kentucky Law Reporter, Vol. 1—405.]

Necessary Party to Suit to Revive a Judgment.

One having an equity in a judgment is a necessary party, either plaintiff or defendant, to a suit to revive the judgment.

Petition to Revive Judgment.

To be sufficient a petition to revive a judgment must describe the judgment desired to be revived, so as to enable the defendants to defend.

APPEAL FROM CAMPBELL CIRCUIT COURT.

November 9, 1880.

OPINION BY JUDGE COFER:

The utmost effect of the order at the end of the judgment first

rendered was to invest the appellee with an equity to \$200 of Hallam's judgment against the insurance company, and we think it had that effect. Having only an equity, Hallam was a necessary party, either plaintiff or defendant, to a suit to revive the judgment.

It is, moreover, impossible to determine from the petition which of the two judgments the appellee sought to revive. He did not describe either in such a way as to enable the court to know what he desired, or to enable the appellants to defend. Moreover, if the petition had been sufficient the only order proper to be made was an order to revive the former judgment to the extent it remains unsatisfied, and this being done the former sale should have been disposed of in some way before ordering a second sale.

Wherefore the judgment is *reversed* and cause remanded for further proper proceedings.

J. G. Carlisle, for appellants. A. Duvall, for appellee.

J. J. TYE, ET AL., *v.* H. F. FINLEY, ET AL.

[Abstract Kentucky Law Reporter, Vol. 1—402.]

Appeal Dismissed.

When an appellant directs his appeal to be dismissed it will be done.

Petition to be Made Parties to Appeal.

Where persons file a petition to be made parties, and the clerk certifies only that the paper copied is the pleading offered by them, such petition is not thereby made a part of the record.

APPEAL FROM WHITLEY CIRCUIT COURT.

November 9, 1880.

OPINION BY JUDGE PRYOR:

Renfro has directed the appeal to be dismissed so far as he is concerned, which must be done. The petition of Bradley, Scanlon and Lewis to be made parties is not made part of the record, and the statement of the clerk that the paper copied is the pleading offered by them is not sufficient, as has been repeatedly decided.

The judgment only directs a sale of Renfro's interest in the land. This was error, which may have prejudiced Renfro but cannot have prejudiced Tye. Renfro's answer, as well as Tye's, shows that one-

fiftieth of the land belongs to Tye, and the purchaser will be bound by that notice in the pleadings and the form of the judgment, and only acquired the interest of Renfro, which is forty-nine fiftieths of the whole.

Judgment affirmed.

R. M. & W. O. Bradley, for appellants.

Frank Waters, for appellees.

SUSAN E. DARNABY *v.* W. G. DARNABY'S ASSIGNEE, ET AL.

[Abstract Kentucky Law Reporter, Vol. 1—399.]

Husband and Wife—Husband's Creditors.

Where real estate is purchased with the wife's money, but conveyance is made to the husband, the wife can have no claim on such property as against the husband's creditors.

APPEAL FROM FAYETTE CIRCUIT COURT.

November 9, 1880.

OPINION BY JUDGE PRYOR:

Conceding for all the purposes of this case that the house and lot was purchased with the means of the wife in pursuance of an agreement between the husband and the wife that the title should be made to the wife, and that the husband regarded the sum of money collected for that purpose as a debt owing by him to his wife, and still as between the creditors of the husband and the wife, he must not only be regarded as having reduced the property of his wife to possession, but as the real owner, and his bad faith to her in failing to execute his agreement is her loss, and not that of the creditors.

The choses-in-action of the wife, when reduced to possession by the husband, become his property, and his recognition of the fact that he is the debtor of his wife does not, as between the wife and the husband's creditors, protect her. Such executory agreements cannot be enforced against creditors, and if the chancellor can see such equity on the part of the wife as would now enable her to share with the general creditors he would in the first place have adjudged that she was entitled to a conveyance of the house and lot. This court has repeatedly decided a similar question from the Woodford Circuit Court, sustaining the judgment below. See *Nichols v. Scarce*, Abstract, 1 Ky. L. 270, Mss. Opin.

Judgment affirmed.

Houston & Mulligan, for appellant.

Morton & Parker, for appellees.

WILLIAM J. BEAL, SR., *v.* JAMES ARNOLD, ET AL.

[Abstract Kentucky Law Reporter, Vol. 1—403.]

Adverse Possession of Land for More Than Thirty Years Gives Title.

Where one purchases land and goes into possession up to a certain boundary, and he and his grantees hold possession for thirty or more years, it is then too late for the heirs or grantees of the vendor to assert a claim beyond such recognized boundary line.

APPEAL FROM BULLITT CIRCUIT COURT.

November 11, 1880.

OPINION BY JUDGE PRYOR:

The original action to enforce the lien for the purchase-money did not involve the title to the land in controversy or the boundary of the respective lands of Beal and Lansdale, and therefore cannot be regarded as a *lis pendens*, as it neither settles the question of title or boundary. That the heirs of Lansdale owed the purchase-money is conceded, but when that was paid no encumbrance existed upon any part of the tract. The only question now before the court is: Did the tract of land sold by one of the heirs of Lansdale to the appellee, Arnold, belong to the appellant, or is it embraced in the moiety sold by the ancestor of the appellant to Lansdale?

The testimony shows that Lansdale took possession of the lower end of the tract of land as early as 1825 or 1826, and that he has, or those claiming under him have, been in the actual and undisturbed possession since that time. He claimed that the boundary of his moiety extended to what is called Cedar Point Branch. This claim was notorious and evidenced by an actual possession on his part or his tenants. The ancestor of the appellant never asserted any claim beyond this line, and when selling off portions of his moiety, called to run to this Cedar Point Branch. That there was a division line established by Beal and Lansdale we think is manifest. If the land was undivided, in the sales made by Beal, Lansdale would have been a necessary party to the sales, or if not would at least have been consulted with reference to the sale of property in which he had a joint interest. This seems never to have been done, and Lansdale was permitted to remain in possession under his purchase, claiming to a certain boundary, for nearly a half of a century before his vendor, or those inheriting from him, discovered that he was in the possession of more land than he had purchased. Beal took possession of the

upper end of the tract and Lansdale the lower end, the latter actually cultivating to a certain boundary for more than thirty years, and the former recognizing that as the boundary by selling to the line claimed by Lansdale and no further, neither claiming beyond this recognized line during the whole period.

There is no doubt but that the division line was fixed by the parties, and we doubt whether Lansdale had more land in his possession than the one-half of the tract. The original agreement between Lansdale and Beal, filed in the action long since decided by this court, gives the boundary of the tract in which the two parties had an equal interest, and it is not pretended that Lansdale has more of the land than Beal or those holding from him; and if such was the case the proof is so positive as to the claim and possession of Lansdale for so many years that a division should be presumed. The fact that the land in the action to recover the purchase-money was treated as undivided will not be permitted to disturb the long and continued claim and possession, as there was nothing to call the attention of the court or litigants to any claim by appellant of land then in the actual possession of Lansdale's heirs.

The judgment below is *affirmed*.

R. H. Field, for appellant. R. J. Meyler, for appellees.

WILLIAM H. MEFFORT *v.* CALLOWAY & IRELAND.

[Abstract Kentucky Law Reporter, Vol. 1—406, as *Meffert v. Calloway*.]

One Litigant Cannot Assert a Claim for Another.

When one who is the party injured is before the court as a party and fails or refuses to ask for a recovery, another party to such suit cannot claim for him any such a right.

APPEAL FROM LOUISVILLE CHANCERY COURT.

November 11, 1880.

OPINION BY JUDGE PRYOR:

On a re-examination of this record it is apparent that no defense has been interposed by the appellant to the recovery sought. It nowhere appears by any pleading that the check had been countermanded by Fisher, and the statement in an affidavit made by Meffort after the judgment had been rendered is of no avail.

Fisher, who is the party injured, was before the court and does

not seek or ask for a recovery of this money. His claim to the fund might have prevailed, but when asserting no claim himself we cannot see how the appellant can claim for him.

The judgment below was proper and is *affirmed*.

M. Mundy, for appellant. Russell & Helm, for appellees.

P. MEGERION v. O. H. HARRISON.

[Abstract Kentucky Law Reporter, Vol. 1—398.]

Purchase-Money on Reconveyance Because of Failure of Title.

Where there is failure of title because of the fact that the conveyance of a married woman was not recorded in the time prescribed by law, there is no reason why, on a reconveyance to the grantor, he should not be compelled to refund the purchase-money received.

APPEAL FROM JEFFERSON COURT OF COMMON PLEAS.

November 11, 1880.

OPINION BY JUDGE PRYOR:

The invalidity of the conveyance by Douglas and wife, so far as it purports to convey the land of the wife being established, there was no reason why the appellant on a tender of a deed reconveying the lots should not be compelled to refund the purchase-money.

Without discussing the effect of the general warranty in the conveyance from the appellant to the appellee, it is evident the parties had some motive in entering into the separate covenant. If appellee is compelled to await an eviction or to look alone to the covenants in his deed for protection, there could have been no reason for the execution of the independent agreement authorizing a rescission if on investigation it appeared the title was defective. This was to avoid the expense of a litigation; and while an investigation resulting in an erroneous conclusion would not authorize a cancelment of the conveyance, yet, if it is in fact true that the conveyance of the married woman was not recorded in the time prescribed by law, the title was defective and a breach of the covenant necessarily followed. The conveyance was made long before the adoption of the general statutes, and the fact that the deed was not recorded as required by law being admitted, or if not admitted that fact being clearly established, the court acted properly in rendering the judgment. Nor does the fact that the defect in the title may be cured, or that Mrs.

Douglas or her heirs, when attempting to recover, will be required to account for assets received by devise or otherwise from Peter Douglas to satisfy his warranty, prevent the recovery. The title is defective, and that the recovery may in a certain contingency be defeated constitutes no defense.

Judgment *affirmed*.

C. B. Seymour, H. M. Lane, for appellant.

W. O. & J. L. Dodd, for appellee.

LEANDER MARTIN *v.* LUCY M. WURTS.

[Abstract Kentucky Law Reporter, Vol. 1—406.]

Dower.

Where a married woman relinquishes her dower upon condition that a judicial sale be set aside, and the land be sold over again, and such sale is not set aside, the relinquishment will not prevent her from asserting her right of dower in such land.

Estoppel of Married Woman.

While a married woman may estop herself from asserting a claim of dower, the doctrine should not be carried too far or interposed unless the proof establishes that her conduct has misled bona fide purchasers, and has induced them to part with their money in a manner they would not have otherwise done. A representation by the court's commissioner or other persons that a married woman has relinquished her dower cannot be attributed to a married woman as a fraud which will bar her claim of dower.

APPEAL FROM GREENUP CIRCUIT COURT.

November 11, 1880.

OPINION BY JUDGE HARGIS:

Before the appellee filed her petition to be made a party in the case of Wm. M. Patton *v.* William Wurts and others, and before she was examined by the special commissioner, Mitchell, the land in which she claims dower in this action was sold to Board. That sale was not set aside, but confirmed, and the land was subsequently sold to pay the purchase-price which Board agreed to pay for it, and the appellant, Martin, became the purchaser.

Her relinquishment of dower was expressly confined to the land which had been sold under the decree and bought by Patton. The commissioner certifies that he read and explained to her the contents

and effect of her petition, that it would be a relinquishment of her potential right of dower in the lands sold to Patton upon the sale to Patton being set aside, and for that purpose she acknowledged that she freely signed said petition.

The order of June 24, 1870, setting aside the sale, states that her petition was filed and relinquishment of potential right of dower made upon the condition that the sale should be set aside, and expresses the opinion that the land should sell for a larger advance. The reason, therefore, that prompted her in making the relinquishment and controlled the court in setting aside the sale was that the land sold subject to her right, if resold freed from it, would bring a greater sum. This condition upon which she made the relinquishment was complied with as to the Patton land, but a resale of the land purchased by Board was not ordered in fulfilment of the condition upon which she agreed to relinquish, but to compel Board to pay the purchase-price stipulated by him for the land purchased from the court's commissioner under its decree before she filed her petition. It is clear that the sale of the land to pay the sum Board agreed to pay for it could not be for more than that sum which the land had brought subject to her dower, and if the land brought more than he had agreed to pay for it, or if a smaller quantity than the whole produced the sum sufficient to discharge his bonds, he was entitled to the excess. In no event could that sale have benefited the creditors or increased the price which the land had brought subject to her potential right of dower, as was the evident intention of Mrs. Wurts, who labored under the belief, as shown by her petition, that a resale of the lands, free from her claim, would produce a sum sufficient to pay the debts of her husband, as in that event she asked for an equitable allowance in lieu of her dower out of the surplus.

While the doctrine of estoppel in pais is recognized as applicable to the acts of a married woman relative to her dower, it should not be carried too far or interposed unless the proof establishes her unconscionable conduct, such as misleads bona fide purchasers and induces or causes them to part with their money, or materially alter their condition, in a manner they would not have otherwise done, for the purpose of the statute pointing out the mode in which her relinquishment shall be made is to protect her from undue influence or dictation, restrained or ignorant surrender of her right of dower.

We see no proof of bad faith on the part of the appellee, or of the slightest semblance of an intention to relinquish or waive her

right in the lands which were sold to Board. If the court's commissioner or anyone else, save Mrs. Wurts, represented that she had relinquished her dower in that tract and thereby misled the appellant, their conduct cannot be attributed to her as a fraud which will bar her claim. If appellant has been injured that injury cannot be repaired out of appellee's property.

Wherefore the judgment is *affirmed*.

E. F. Dulin, for appellant.

E. C. Phister, G. T. Halbert, for appellee.

A. J. (M. M. J.) O'BANNOR *v.* M. F. (M.) CORD

[Abstract Kentucky Law Reporter, Vol. 1—398.]

Claim Against Estate of Deceased Person.

Where money or property comes into the hands of an administrator and is not accounted for and paid over to those persons entitled to it, and a new administrator is appointed, it becomes his duty to proceed by suit or otherwise to collect such assets from the former administrator and the sureties on his bond.

Right of Judgment Creditor to Sue on Bond of Administrator.

A judgment creditor against an estate where there is an administrator acting for such estate, who has not refused to enter suit against a former administrator and his surety to recover assets coming in the former administrator's hands, cannot legally maintain a suit to collect such assets.

APPEAL FROM BATH COURT OF COMMON PLEAS.

November 11, 1880.

OPINION BY JUDGE HARGIS:

October 4, 1850, James E. Walker executed his promissory note to his son, James C. Walker, for the sum of \$140, due twelve months after date. The payee signed the note to Wm. H. Cord, September, 1851. And some time thereafter, it does not appear when, the latter assigned it to M. F. Cord in these words, undated: "pay to M. F. Cord pursuant to contract between us," signed, W. H. Cord.

On that note M. F. Cord, who, it is contended, is the wife of Wm. H. Cord, but that fact does not appear in the record and it cannot be considered, brought suit against him as administrator of said James E. Walker, the obligor in said note, in the Bath Court of Com-

mon Pleas, November 1, 1877, twenty-six years after it fell due. To her petition the administrator entered his appearance and interposed a demurrer, which was overruled, and he failing to plead further a judgment was rendered against him for the amount of the note and interest.

It was alleged in her petition that the administrator, Wm. H. Cord, in 1863 and several times thereafter, promised to pay the note, that he still recognized its validity as existing in full force and virtue, and as administrator promised its payment still. An execution was issued on her judgment and returned *nulla bona*.

She then filed a petition in equity against said Wm. H. Cord, as the real administrator and personal representative of James E. Walker, and James C. Walker and Alexander J. O'Bannor, stating that the defendant, Wm. H. Cord, was appointed administrator of James E. Walker by the Fleming County Court in 1863; that the defendant, J. M. Walker, was appointed his administrator also by said court in 1869, and executed bond with the defendant O'Bannor as his security; and that said court in 1877 revoked and set aside the appointment of the defendant, J. M. Walker, as administrator, and recognized Wm. H. Cord as the real administrator, who gave additional security on his bond.

She averred that assets had come to the hands of defendant, James M. Walker, while he was acting as administrator, and sought judgment against him and O'Bannor for a sum sufficient to pay her judgment against the defendant, Wm. H. Cord, as administrator, obtained in the common-law action above mentioned.

Again the defendant, Wm. H. Cord, entered his appearance, waived answer, and the cause was submitted. No process was served upon the defendant, J. M. Walker, but it was executed on O'Bannor, who failed to appear. A judgment was rendered in her favor against the defendant, O'Bannor, for the sum of \$370, and he has appealed.

The first question of serious importance is: Can the appellee maintain an action against the security of J. M. Walker on his bond executed under a void appointment, which has been so adjudged by the Fleming County Court, but where no question is raised to that judgment? It is urged, however, that no assignment of error has been sufficiently made to raise this question.

The third assignment is in this language: "Appellant had no right to bring this action in which said judgment was rendered

against appellant. The right of action, if any, was in the administrator of James E. Walker." While the word "appellant" is used in the first part of it for the word "appellee," still we think it is sufficient.

The second assignment complains that the petition does not state facts sufficient to constitute a cause of action against him. Taken together we think the errors assigned raise the question. The appellee and her legal advisers evidently labored under the belief that a judgment by default against the administrator, Cord, and a return of *nulla bona* upon an execution issued thereon, established a *devastavit* against him, and therefore she would have the right to institute this action.

While that may have been the effect of such a judgment and return as it is claimed was held in *Walker v. Kendall*, Hardin, 404, that is not the law now. By Sec. 31, Chap. 39, General Statutes, it is provided that: "No personal representative shall be liable for more than the amount of assets which have or may come to his hands to be administered on account of having failed to plead or make defense, etc., but the judgment of the court shall only render him liable for the amount of assets in his hands unadministered." Such a judgment never did bind or conclude anyone but the administrator suffering it, as to assets. *Hobbs v. Middleton*, 1 J. J. Marsh. 176.

His sureties were left free to plead the facts whether he had received assets or not, and, if any, what amount, before the statute, *supra*. Since its passage the administrator is in the same attitude as his sureties as to that question. Now as judgment and return of *nulla bona* do not convince the administrator of willful waste of the property, direct abuse, maladministration or neglect, then it seems to us that in order to maintain an action by a creditor to recover the value of assets of the deceased from any person, other than the legal administrator, some equitable ground should be shown affecting the debtor and administrator authorizing such an undertaking upon the part of the creditor.

It is the duty of the administrator to collect the assets of the decedent and pay his debts with them, and creditors cannot usurp the discharge of such duties. The creditor in this case has not alleged any default, neglect, refusal or inability upon the part of the legal administrator to take proper steps, either by suit or otherwise, to collect or recover the assets of the decedent, that may have been converted by the defendant, J. M. Walker, under color of administra-

tion. Nor is any collusion upon the part of the administrator and supposed debtor alleged.

In the case of *McChord v. Fisher*, 13 B. Mon. 196, speaking of suits to recover the unadministered estate of the intestate or to collect debts, the opinion declares that "such suits can only be maintained by the personal representative who has qualified as such, if there be one, or if not, by one or more to be appointed to administer, except in cases where the distributees may sue in equity to recover the estate, or portions thereof, because the administrator refuses to administer upon the estate sued for or to prosecute suits for the recovery thereof."

It was decided in *Ewing's Heirs v. Handley*, 4 Litt. 346, that creditors may recover assets for the administrator where he will not or cannot himself recover them. In the cases of *Griffith v. Commonwealth*, 1 Dana 270; *Montmolin v. Gaunt*, 5 Dana 405; *Pilkington's Ex'x v. Gaunt*, 5 Dana 410, cited by appellee's counsel, the proceedings were against the legal representatives for a failure of duty in the two last cases, and in the first to render him responsible for goods, etc., that came to his knowledge but were not collected.

The case cited of *Hefferman v. Forward*, 6 B. Mon. 567, decided that a creditor might bring a suit in equity against the heirs where there had been no administration for twelve months. There has been no case cited, nor have we been able to find any where a creditor could institute suit to recover the unadministered estate or collect debts, without showing that the administrator, with knowledge of the existence of assets, failed or refused to collect them. There is no averment in the petition that the administrator, Cord, was even unaware of the claim alleged to exist against the defendant, J. M. Walker, and his surety, O'Bannor, or that this action was necessary to the discovery of it. There is no fact alleged in the petition showing that the object of the action was for a discovery of any property to which the defendant, Wm. H. Cord, was entitled as administrator. But the purpose of both actions was to secure a judgment upon a stale demand assigned by the administrator, himself, in his individual right, to the plaintiff so that he could confess judgment, which he did do, without service of process upon him.

Without all this circumlocution the administrator, Cord, had the bond executed by him under the appointment of the Fleming county court for the recovery of any assets belonging to the intestate, as the bond is based upon a valid consideration and is not contrary

to public policy or the express letter of the law, and therefore it is a good common-law bond. Should he recover, it will become his duty to use the amount recovered in payment of the bona fide debts of the intestate, and in performance of the requirements of law.

Wherefore the judgment is *reversed* and cause remanded for further proceedings consistent with this opinion.

J. S. Hurt, for appellant.

M. M. Teager, J. M. Nesbitt, R. Gudgell, for appellee.

H. F. THOMAS *v.* COMMONWEALTH.

[Abstract Kentucky Law Reporter, Vol. 1—407.]

Criminal Law—Indictment.

An indictment for grand larceny is sufficient which charges that "The said ——— feloniously took and carried away one buggy of the value of \$100 and two horses of the value of \$100 each, the personal property of James S. Long.

Ownership of Property Charged to Have Been Stolen.

Where the ownership of stolen property is charged to have been in a named person, there is no variance when the proof shows such property to be owned by said person's wife, where it is also shown that it was in the possession and under the control of the husband as agent for the wife at the time it was stolen.

APPEAL FROM McCRACKEN CIRCUIT COURT.

November 11, 1880.

OPINION BY JUDGE HINES:

We think the indictment is good. The charge is of grand larceny, and the specification that "the said ——— feloniously took and carried away one buggy of the value of \$100 and two horses of the value of \$100 each, the personal property of Jas. S. Long," etc. *McBride v. Commonwealth*, 13 Bush 337.

The proof in the case was that the property belonged to the wife of Jas. S. Long, but that it was in the possession and under the control of the husband as agent for the wife at the time it was obtained by appellant. This, we think, was not a fatal variance. It is well established that where one holds property for another, as bailee, agent or in any other capacity the property may be laid in the bailee or in the true owner. Wharton on Criminal Law (10th ed.), Sec.

938; 2 Bishop on Criminal Procedure (3d ed.), Secs. 720, 721; Bishop on Criminal Law, Sec. 789; Sec. 128, Criminal Code.

Although the penalty for horse-stealing is confinement in the penitentiary from two to ten years, and for stealing other personal property from two to five years, horse-stealing is nevertheless larceny, and as the court instructed the jury that the penalty for stealing the one or the other is as indicated, the instructions were not prejudicial to appellant. Instruction No. 4 conforms to the law as stated in the second paragraph of this opinion.

By Acts of March 4, 1880, Chaps. 360-361, it is provided that this court shall not reverse in criminal cases unless the errors complained of appear, on consideration of the whole case, to be prejudicial to the substantial rights of the accused. Substantial justice appears to have been meted out in this case, and therefore the judgment is *affirmed*.

W. G. Bullitt, for appellant. P. W. Hardin, for appellee.

TRUSTEES OF RICHMOND *v.* CARLISLE D. WALKER.

[Abstract Kentucky Law Reporter, Vol. 1—399.]

Taxation by Town.

Where a town charter authorizes the taxation of all personal property and choses in action, the term "cash capital" applies to money owing and on interest as well as to money in the hands of the person assessed.

APPEAL FROM MADISON CIRCUIT COURT.

November 11, 1880.

OPINION BY JUDGE HINES:

The conclusion of the court below that the town charter authorizes the taxation of all personal property and choses in action, and that the term "cash capital" applies to money owing and on interest as well as to money in the hands of the person assessed, we think is unquestionably correct, and under authority of *Barret & Co. v. City of Henderson*, 4 Bush 255, we are constrained to hold that the time of the assessment is determined by the general law.

Judgment *affirmed*.

T. J. Scott, for appellant. Chenault & Bennett, for appellee.

S. H. PEARCY *v.* J. W. HEATH.

[Abstract Kentucky Law Reporter, Vol. 1—407.]

Landlord and Tenant.

Where the term of a lease is for a long period the mere fact that the lessee may terminate it sooner does not make him a tenant at will or by sufferance.

APPEAL FROM PULASKI CIRCUIT COURT.

November 12, 1880.

OPINION BY JUDGE PRYOR:

Under the lease the appellant held for an indefinite period, and no action on the part of the appellee could evict him without his consent. The lease, it is true, might be cancelled for sufficient reasons, or subjected to the payment of the annual rental, but the right to enter on the part of the appellee could not be exercised without the authority of the appellant or that of the chancellor. This action of trespass having been transferred to a court of equity by consent we should treat it as tried by a jury, and would affirm the judgment but for the fact that the entry is admitted and the petition dismissed on the ground that the act of subletting the warehouse was a forfeiture of the lease.

The judgment could not have gone for the appellee on any other hypothesis. Sec. 2, Art. I, Chap. 66, General Statutes, does not apply in this case. The term is for longer than two years, and the mere fact that the lessee may terminate it sooner does not make him a tenant at will or by sufferance. He consults his own will and not that of his landlord, but as against him may hold it as long as he pleases unless there is some reason for canceling it, and this does not appear in the record.

Judgment *reversed* and cause remanded for further proceedings.

Curd & Waddle, for appellant.

Morrow & Newell, for appellee.

MILTON HALSEY *v.* COMMONWEALTH.

[Abstract Kentucky Law Reporter, Vol. 1—402.]

Criminal Law—Continuance of Trial.

Where a continuance is applied for by a defendant in a criminal case the applicant must act candidly in his dealing with the court, and where from the statements in such an application there is a doubt of good faith, the court is justified in refusing the application.

Instructions.

Where one is convicted of manslaughter he could not have been prejudiced by even an erroneous instruction on what constitutes murder.

APPEAL FROM CLARK CIRCUIT COURT.

November 12, 1880.

OPINION BY JUDGE COFER:

There does not appear to have been any error in overruling the motion for a continuance. There was not sufficient evidence of a probability of getting the witnesses at another term. In his affidavit the appellant said the letter informing him that Aleen was in Covington was written to him, but when inquired of by the court whether he could produce the letter he answered that it was written to his codefendant, who had it at Lexington.

This was calculated to create a suspicion that he was not dealing candidly with the court, and when taken in connection with the fact that he stated in the last affidavit that he could prove by Aleen much more than he had stated in his affidavit at a previous term justified the court in overruling a motion for a continuance.

We have not been able to see the opinion rendered on Cash Halsey's appeal, but there is this distinction between that case and this: Cash was convicted of the crime of murder, and the jury may have supposed that the instruction was intended to tell them that, the fact that there was a mutual combat would not excuse from murder, that is, that even though, the combat may have produced heat of blood it would not reduce the grade of the crime to manslaughter. But in this case the accused was found guilty of manslaughter, and, therefore he could not have been prejudiced by that part of the instruction complained of.

Judgment affirmed.

Nelson & Hathaway, for appellant. P. W. Hardin, for appellee.

[Cited, *McClurg v. Igleheart*, 17 Ky. L. 913, 33 S. W. 80.]

RANSOM & MARY WADE v. COMMONWEALTH.

[Abstract Kentucky Law Reporter, Vol. 1—408.]

Criminal Law—Murder.

Where the record on appeal in a murder case does not show a conviction by the jury, but does show that the trial court pronounced judgment of guilty, the Court of Appeals will not so far indulge the presumption that there must have been a finding by the jury, as will result in the imprisonment of the defendants during their natural lives, especially where the clerk reports that there is no record in his office showing a conviction by the jury, except a mere memorandum on the back of the indictment.

APPEAL FROM FULTON CIRCUIT COURT.

November 12, 1880.

OPINION BY JUDGE PRYOR:

Sec. 14, Art. 4, Chap. 29, General Statutes, was enacted to punish the mother for concealing the birth of a bastard child "so that it might not be known whether it was born alive or not," and while its enactment does not prevent an indictment for murder, it was passed evidently for the purpose of relieving juries of the embarrassment and this jury seemed to have felt in the consideration of this case. The pains of childbirth causing the unfortunate woman to become frantic and to leave her bed in the act of giving birth to the child may have caused its death, and the action of the brother in attempting to conceal the shame and disgrace of his sister were facts calculated to make the jury hesitate before finding a verdict of guilty on the charge of murder.

There seems, however, to be no verdict in this case, and while the court will presume that there must have been some finding on the part of the jury, else the court would not have entered the judgment, still, in the absence of any record showing a conviction by the jury, and when the clerk returns that there is no such record in his office, we would be reluctant to enforce this judgment upon the presumption indulged in on behalf of the judge that must result in the imprisonment of these parties during their natural lives.

The clerk responds when called upon to supply a diminution in the record that it is complete as appears from the proceedings in the court of which he is clerk, but he finds a memorandum on the back of the indictment showing a verdict; that this is not on the minute book, or on the regular records of the court, and such being the case

this record fails to show that there was a verdict upon which the judgment could have been rendered. Nor ought the court upon the case as it now stands enter the verdict on the return of the cause, but should grant the parties, if such a verdict was rendered, a new trial.

Judgment *reversed* and cause remanded for further proceedings.
C. L. Randle, for appellants. P. W. Hardin, for appellee.

MARGARET HILLIS v. JOSEPHINE HILLIS, ET AL.

[Abstract Kentucky Law Reporter, Vol. 1—408.]

Consideration for an Agreement.

Where a person accepts an estate devised to him which requires him to support and maintain another out of it, such person is entitled to a reasonable support, and an agreement with the ancestor by which she agrees to take less than what she is entitled to is without consideration and cannot be insisted upon by the devisee.

APPEAL FROM CUMBERLAND CIRCUIT COURT.

November 13, 1880.

OPINION BY JUDGE PRYOR:

In this case the appellees are in the possession of an estate charged with the support and maintenance of the appellant, and they present as a defense to her right of recovery her mere promise or agreement in writing with their ancestor to take less than she is entitled to receive.

The agreement, if it can be called such, is without consideration, and if there was a consideration, the party owning the estate and who accepts it under a devise that requires him to support and maintain another out of it, would not be allowed to make such an unconscionable bargain.

The judgment is reversed and cause remanded with directions to ascertain a reasonable sum for the support and maintenance of the appellant, and make the same a charge upon the estate devised, the allowance to be made from the death of S. W. Hillis.

Judgment *reversed* and cause remanded for further proceedings consistent with this opinion.

Sandige & Allen, for appellant. Lewis McQuown, for appellees.

NEWPORT & DAYTON ST. R. CO. v. CITY OF NEWPORT.

[Abstract Kentucky Law Reporter, Vol. 1—404.]

City Franchise—Injunction.

Where power is given a city to grant a franchise to a street car company to operate a line of horse cars on flat rails in the streets of the city, and such franchise is granted, if the street car company thereafter, under its franchise, attempts to relay the rails and replace them by other kind of rails, with a view to operate steam cars on such streets, it may be enjoined from doing so.

APPEAL FROM CAMPBELL CIRCUIT COURT.

November 18, 1880.

OPINION BY JUDGE PRYOR:

The charter of the appellant authorizes the construction of the street railway by the consent of the city council of Newport, and the terms and conditions upon which this consent was obtained is found in the ordinance of the 17th of September, 1870. That authorizes the construction of the railway to be operated with horse cars upon a flat rail track. The company undertakes, after this consent by the city, to reconstruct the track or relay the rails, with a view of running their cars with other than horsepower without any license from the city. Their charter under which they are acting leaves the question as to the propriety and safety of a change in the motive power by which its cars are run to the city. When the company attempted to relay the track with the avowed purpose of using steam power we see no reason why the chancellor should not interfere. The object of the injunction was to prevent the change upon the idea, doubtless, that the public convenience and safety required such steps to be taken by the city authorities.

The chancellor, upon the hearing of a motion made to dissolve the injunction, modified it as originally granted and entered an order, the effect of which was "to restrain the company from running its cars by any other than animal power," and the objection now made is that no such relief is authorized by the petition. The chancellor, on the hearing of the motion no doubt considered, as he should have done, the purpose for which the petition was filed and the nature of the relief required, and when it was charged in the pleading of the appellee "that appellant was making the change in the track with a view and for the purpose of running a steam car," he not only had

the power, but it was his duty, if justified by the facts, to confine the operation of the injunction to restraining the company from the use of steam power, and that he has done by the order already referred to.

The fact that at the time the order was entered the company was using animal power instead of steam did not authorize the company, after the order had been made, to use steam power, as it was in direct violation of the order made by the chancellor. The statements of the petition authorized such an injunction when the petition was filed, and the chancellor, supposing that the injunction as originally granted would embarrass the company in even running its cars with animal power, said that it should not operate so as to prevent the company from repairing its track; and as the sole purpose of the appellee was to prevent the use of steam power he would enter an order preventing its use. This was clearly within the range of the prayer for relief, and the response was properly adjudged insufficient. If the appellants are not using steam power the motion to punish for contempt will be dismissed, but if using it after the order was entered by the chancellor it was in violation of both the agreement made with the city and the order of injunction.

Judgment affirmed.

J. R. Hallam, for appellant, A. T. Root, for appellee.

H. A. MEYER v. R. N. MILLER, JR.

[Abstract Kentucky Law Reporter, Vol. 1—411.]

Agreement to Cancel Lease.

An agreement to cancel a lease does not release the tenant and his surety from liability for rent already accrued thereunder.

APPEAL FROM JEFFERSON COURT OF COMMON PLEAS.

November 18, 1880.

OPINION BY JUDGE COFER:

There is no brief for the appellant on file, and although the case was orally argued by his counsel it has been nearly two years since that argument was made, and it has passed out of the minds of the members of the court.

That the appellant was surety for his brother, and as such bound for the rent, is not only apparent on the face of the writing, but is shown by both the pleadings and the evidence. The agreement by

which the lease was cancelled did not release the appellant from liability for rent already accrued. How such an agreement could prejudice him is not made apparent by anything in the record.

The principal enjoyed the use of the leased premises for the period for which rent is sued for; as to that the consideration for appellants undertaking has been received, and no reason is perceived for releasing him from that part of his undertaking. The judgment as copied into the transcript is for \$181. This is certainly not more than the appellee was entitled to, and the judgment is *affirmed*.

Lane & Harrison, for appellant.

Clemmons & Willis, for appellee.

JOHN S. ISAACS, ET AL., *v.* JOHN S. MURPHY, ET AL.

[Abstract Kentucky Law Reporter, Vol. 1—409.]

Statute of Limitations as to Sureties.

Sureties on a bond executed in the course of a judicial proceeding are released by the statute of limitations after seven years from the time an action accrues thereon.

Parties to a Suit to Recover Money Due an Intestate.

Personal representatives alone are authorized to sue for and recover money due an intestate; and it is only where it is alleged that there is no executor or administrator that heirs or descendants may sue or receive such money.

APPEAL FROM LINCOLN COURT OF COMMON PLEAS.

November 18, 1880.

OPINION BY JUDGE PRYOR:

These causes will be heard together, as the same question is involved in each. The bond having been executed in the course of a judicial proceeding, the statute of seven years released the sureties as was heretofore decided by this court on a former appeal. On the return of the cause the appellants endeavored to avoid the effect of the statute by a reply, alleging that they were non-residents of the state, some of them married women and others infants at the time the cause of action accrued.

They also alleged that they were in ignorance of their rights, and

this fact was concealed from them by the commissioners whose sureties are now the appellees, and sought to be made liable. The failure of the commissioner to inform the appellants of the action pending, or the nature of their rights, cannot be regarded as fraudulent on his part, or such a concealment of facts as would affect his sureties. At the death of Mrs. Givens, her next of kin or those entitled to represent her should have appeared in the action, and whether infants, *feme covert*s or non-residents, it was no part of the duty of the commissioner to make them parties to the action, or to inform them of their right to money or property, as they must be presumed, so far as these sureties are concerned, to have possessed all the knowledge necessary to enable them to enforce their respective claims.

We take it for granted, however, that a demand by these appellants of the commissioner would not have authorized a payment of the money, or effected a release of the sureties, in an action by the personal representative of the intestate, Mrs. Givens. The latter died after the termination of the action, or rather after the land had been sold, the report of sale confirmed and a distribution ordered. What right, then, had these appellants to receive the money? It is not alleged that they or any of them are the administrators of the intestate, and we regard it as well settled that the personal representative alone could have received the money in such a case. It is not alleged that there was no executor or administrator, nor any reason given why an action was not instituted, except the fact that these appellants were non-residents and some of them infants.

The married women and their husbands could have brought an action, and whether the infants could or not, it is plain that the reply is defective when in the ordinary course of distribution this money must have passed through the hands of the administrator before reaching the pockets of the distributee. It may be that this money has been paid to her representative, and this court has no right to presume to the contrary. Subsec. 5, Art. 6, Chap. 71, Gen. Stat., provides that the limitation shall not apply to so much of the time elapsed when there was no administrator, etc., or other person authorized to sue.

Now why could not an executor or administrator have brought the action? The response may be that none qualified, and if so the

facts must appear in your reply to make it a good one, the cause of action, if appellants have any, depending upon such an averment.

The judgment below is therefore *affirmed*.

W. H. Miller, for appellants. T. P. Hill, for appellees.

WYATT PEARCE *v.* BOARD OF TRUSTEES OF TOWN OF LANCASTER.

[Abstract Kentucky Law Reporter, Vol. 1—412.]

Town Charter—Power to Prevent Nuisance.

Where a town charter gives it power to cause the removal of nuisances, and under such power the town trustees enact an ordinance subjecting to a fine the owner of any unruly or dangerous animal who permits it to run at large, the town marshal may remove dangerous animals from the streets, but his failure to do so cannot be made the foundation of an action by which the town can be held liable for damages.

APPEAL FROM GARRARD CIRCUIT COURT.

November 20, 1880.

OPINION BY JUDGE PRYOR:

The trustees of the town of Lancaster, by the provision of the town charter, have power to remove or cause to be removed any nuisance within the town, and, it seems, by virtue of that section of the act of incorporation, enacted an ordinance subjecting to a fine the owner of any unruly or dangerous animal who permits it to go at large in the town. Having enacted this law it was perhaps the duty of the town marshal to have removed the goats, if in possession of facts sufficient to convict them of being vicious and unruly animals, or if the owner knew of their bad habits he could be made to answer in damages. The personal knowledge that each trustee of the town may have had of the bad reputation of these mischievous animals imposed no greater obligation on them than to look to their own personal safety, and this they seem to have done. Having enacted the ordinance they had performed their duty, and the neglect, if any, by the officer intrusted with the duty of taking charge of the unruly animals, cannot be made the foundation of an action by which the town can be held to respond in damages. It is the duty of the town authorities to keep the streets in repair and to have all obstructions removed that impede travel, or are dangerous to those passing. The

appearance of these goats on the street cannot, as is argued by counsel, be regarded as obstructing travel, and while their mischievous pranks seem to have frightened appellant's horse, resulting in great loss to him, he cannot look to the town to repair the injury. It is not alleged that these goats were the property of the corporation or that the town had any interest in them, and the appellant having alleged the adoption by the city of an ordinance to protect private property and prevent personal injuries, by punishing those who permit unruly animals to go at large within the town, has shown that the town legislature has discharged its duty. This police measure is all that is required of them, and others must be looked to for indemnity. *Prather v. City of Lexington*, 13 B. Mon. 559.

The judgment sustaining the demurrer is *affirmed*.

Denny & Tomlinson, for appellant.

Anderson & Herndon, for appellees.

HENRY D. McHENRY v. ROME MILL COMPANY.

[Abstract Kentucky Law Reporter, Vol. 1—413.]

Mechanic's Lien—Statement Filed to Secure.

A mechanic is only entitled to a lien for work in constructing a building when he files a notice of his lien within sixty days from the time such labor ceases and he waives his lien by failing to file his notice within the time prescribed; and where, after he ceases to work in the construction of a mill, but engages to work for its owners on a salary in running the mill, a statement filed by him seven months after the construction work was done by him but within sixty days from the time he ceased work in running the mill is not sufficient to secure him any lien.

APPEAL FROM OHIO CIRCUIT COURT.

November 20, 1880.

OPINION BY JUDGE HINES:

Appellant and appellee, both stockholders in the Rome Mill Company and creditors of said company, assert their respective demands and claim priority in the distribution of the assets of the company. Appellant claims priority by virtue of an attachment, and appellee under the mechanic's lien law. The sole question is: Had appellee a mechanic's lien on the mill property at the date of the levy of appellant's attachment in August, 1878?

Section 6, Chap. 70, Gen. Stat., provides that a mechanic's lien "shall be dissolved, unless the claimant, within sixty days after he ceases to labor or furnish material, files in the office of the clerk of the county court of the county a statement of the amount due him, with all just credits and set-offs known to him," etc.

Appellee filed his claim in the county clerk's office on the 2d of September, 1878, and instituted his action to enforce the lien on the 28th of October, 1878, which action was consolidated with that of appellant. The account filed by appellee in that action is as follows:

"1878, Rome Mill Company.

	To J. P. Hunter,	Dr.
To work on mill, 244 days at \$3.50.....		\$854 00
To running mill seven months at \$50.....		350 00
To F. Hunter, to four months running mill engine		80 00
		<hr/>
		\$1,284 00"

Appellee in his deposition says in reference to this matter: "As to my account filed in the clerk's office 244 days was for millwright work exclusive, at which time we concluded to run the mill so as to defray expenses, and as fast as we could get the material, finish the mill. At that time I went to work for the company for \$50 a month as miller, millwright and superintendent of the machinery department, with the understanding that we would finish the mill as soon as we could."

It also appears in evidence that some work was done on the mill after it began to run, and that a portion of this work was done as late as August, 1878, and that it never was completed as originally designed. The exact date at which appellee ceased to charge for services as a mechanic and began to charge for services as miller does not appear further than as shown by the account referred to. This account shows no charge for services as mechanic or machinist later than seven months prior to the 2d day of September, 1878, although, as we have seen, some little work was done during the time for which he charges for services as miller.

The inquiry then is: At what time did appellee "cease to labor" as a mechanic or machinist in the construction of the mill. It appears to us that appellee has answered for himself that he so ceased to labor seven months prior to the filing of his claim in the county clerk's office. Claiming to come within the mechanic's lien law, it is

incumbent upon him to show that fact, but as we have seen by the extract from his deposition he does not show a case within the law, nor does his petition to enforce his lien show such a case. In his petition he alleges that within sixty days "after he ceased to labor for said Rome Mill Company he filed in the clerk's office" his claim, etc. But it is not alleged that this was done within sixty days after he ceased to labor in the construction, erection or repair of the mill.

That he did labor for the company up to within sixty days of filing his claim is clearly manifest, but his claim filed with his petition shows that this labor for which he charges was for running the mill, and not for its construction. His petition upon its face shows no right to recover. It is not enough to allege that he did labor within the sixty days, but it must also be alleged that the labor was of that character which entitles him to a lien under Chap. 70 of the General Statutes. But it may be conceded that this was simply a defective statement of a cause of action that might be cured by tendering an issue, and yet he cannot recover, as far as the enforcement of a lien is concerned, because his exhibit upon which he declares shows that the labor for which he would be entitled to a lien was not in any part performed within sixty days of filing his claim. That the mill was not completed according to the original design, and that appellee could not complete it because the company did not furnish the material, does not alter the case. The right to a lien is statutory and not by a contract. We need not decide whether appellee would have brought himself within the statute if he had charged as a mechanic or machinist for work done on the mill during the seven months for which he charges for running the mill, for no such case is presented either by the pleadings or by the evidence.

Whatever moral claim appellee may have to a preference it appears to us clear that under the law his claim is not superior to that of any other creditor whose debt is unsupported by attachment. We are, therefore, of the opinion that the court erred in giving preference to the appellee over appellant, and so much of the judgment of the court below as gives this preference is *reversed* and cause remanded with directions for further proceedings consistent with this opinion.

McHenry & Hill, for appellant. Walker & Hubbard, for appellee.

BROWN & O'BRYAN v. JAMES M. BALLARD.

[Abstract Kentucky Law Reporter, Vol. 1—411.]

Sheriff's Sale and Execution.

When a sheriff collects money on an execution on the defendant's property, he has no right to appropriate a part of the money to the payment of taxes due by the defendant, leaving plaintiff's debt unsatisfied. No levy had been made by him for such taxes; besides, it appears that the defendant had other property sufficient to satisfy the taxes.

APPEAL FROM MARION COURT OF COMMON PLEAS.

November 20, 1880.

OPINION BY JUDGE PRYOR:

The rule in the case should have been made absolute and the sheriff required to pay the money over to the appellant. He had levied appellant's execution on the defendant's property and exacted from him a bond of indemnity. On the day of sale he appropriates a part of the proceeds to the payment of the taxes due by the defendant leaving the appellants' debt unsatisfied. He does not even show any authority to collect the taxes, and certainly no levy had been made by him. Besides, appellee's own statement makes it appear that the defendant had other property amply sufficient to satisfy the taxes, and yet he required a bond of indemnity and then appropriated the money to taxes due a former sheriff. He should have made the taxes, if he had any such authority, out of the other property.

Judgment *reversed* and cause remanded for further proceedings.

Russell & Arritt, S. A. Russell, for appellants.

Rountree & Lisle, for appellee.

WILLIAM HOWELL, ET AL., v. JAMES V. SMITH, ET AL.

[Abstract Kentucky Law Reporter, Vol. 1—415.]

Conveyances to Defeat Creditors.

A father must be just before he is generous, and he has no right to make gifts to his children at the expense of his creditors. A conveyance made to a son for a nominal consideration, the father retaining control of the estate conveyed, will be set aside and made subject to the father's debts existing at the time of such conveyance.

Validity of Bonds for Sale of Real Estate.

Bonds for the conveyance of real estate, where their validity in a court of law has been tested in a trial before a jury under a plea of non est factum and found executed, are valid as between the parties to them, and the Court of Appeals will not reverse on that issue unless the evidence and instructions upon which the verdict was based are clearly insufficient and erroneous.

APPEAL FROM LARUE CIRCUIT COURT.

November 20, 1880.

OPINION BY JUDGE PRYOR:

The validity of the bonds under which the appellees, the heirs of Samuel Smith, claim title to the land in controversy cannot be questioned in this court. An issue out of chancery on the plea of non est factum was made, and the verdict of a jury had, resulting in establishing the fact that the bonds were signed by Samuel Smith. There is no bill of exceptions presenting the history of that trial, and however uncertain the fact of the execution of the bonds by Samuel Smith may be on the facts found in the record, we cannot reverse the judgment of the court below on that issue.

We have the verdict of the jury and the judgment of the court upon it, and, while there may have been no other evidence than that now in the record on the issue raised, this court will not disturb the finding unless the evidence and instructions upon which the verdict was based is identified as in ordinary trials by court and jury of issues of fact.

Waiving, therefore, any other consideration of that question, we will proceed to inquire as to the validity of those bonds so far as they affect the claims of the appellants as creditors of Samuel Smith, it being alleged in the petition that the bonds were executed with the fraudulent purpose of evading the payment of their debt. The action of Uptigrove's heirs was instituted in the year 1845 to recover certain lands, and the rents Samuel Smith had wrongfully acquired in the management of Uptigrove's estate, he being the administrator. The action instituted in 1845 was not terminated until the year 1860, when a judgment was rendered against Samuel Smith for the sum of \$3,750. Samuel Smith was the owner, at the institution of the action in 1845 by Uptigrove's heirs, of considerable estate in lands and personalty and amply able to pay all his liabilities. He died after

the institution of the present action and his estate turns out to be insolvent.

During the progress of the litigation by Uptigrove's heirs, from the year 1845 to the year 1860, he sold his lands to his children and executed to them bonds for title, reference to which has already been made. The bond to James V. Smith (a son) was executed on the 10th of March, 1845, at a time when no liability existed and when no fraudulent motive could have induced its execution. It also appears from the proof that the purchase-money was paid. In March, 1856, ten years after the institution of the action and when the ancestor of these appellees must have seen that a judgment against him was inevitable, he executed to his son, Warden Smith, a bond for his home farm containing four hundred acres for the nominal sum of \$250, and the agreement that his son was to take care of him and his wife, cultivate the land and give to the father half the profit. The liability of the vendor (the father) to pay these rents up to that date, and so long as he held the land of the appellants, or their assignees, had accrued, and to permit such a sale, even if made in good faith, to avoid the payment of liabilities existing at the time, would be to encourage fraud for the purpose of defeating the claims of creditors. The son, Warden, had no estate, was himself insolvent, and yet under the agreement made at a time when the liability existed and with the certainty of its increasing to a much larger sum, at the death of his father, he is found in possession of the home farm worth three or four thousand dollars and his creditors denied any relief.

It matters not that the estate of his father would at the date of the bond, if sold, have been sufficient to pay all his debts. The debtor must be just before he is generous, and he had no right to make a gift to his son at the expense of creditors. The father and son lived together, the latter with the bond in his pocket, the father using the land and paying the taxes as well as assessing it all the while; and still when he died the son asserts his ownership and claims that the father was a pensioner on his bounty. Such a consideration, even when established, should not prevail against existing creditors. The father in fact owned, enjoyed and used the farm as he always had done, the son performing no more labor than prior to the execution of the bond. It was the father in fact supporting the son, and not the son the father. The land should have been subjected to the payment of the debt. *Trimble v. Ratcliffe*, 9 B. Mon. 511; *Dohoney v. Dohoney*, 7 Bush 217; *Hawkins v. Moffitt*, 10 B. Mon. 81. Certainly one-

half of the personalty left on the place by Samuel Smith at his death was a sufficient compensation for any services rendered by Warden in addition with his own support.

As to the bond to Sarah Smith, the evidence conduces to show the payment of the consideration and that it was a bona fide transaction, and so of the bond to Beall and wife.

This judgment is, therefore, *affirmed* as to all the appellees except Warden Smith. As to him the judgment is *reversed* with directions to subject the land to the payment of the debt. *Affirmed* on cross-appeal. The appeal of Mrs. Conn is dismissed, being barred by limitation.

Judge Cofer not sitting.

Wm. Howell, for appellants.

Read & Twyman, W. H. Chelf, W. P. D. Bush, for appellees.

J. F. MONTGOMERY, ET AL., v. KIRWAN & HENRY, ET AL.

[Abstract Kentucky Law Reporter, Vol. 1—409.]

Delay in Filing Answer.

Where eighteen months elapsed between the time when process was served on a cross-petition before an offer to file an answer to it is made, and no reason is given for such delay, the Court of Appeals cannot decide that there was an abuse of discretion in refusing to allow it to be filed.

APPEAL FROM LOUISVILLE CHANCERY COURT.

November 20, 1880.

OPINION BY JUDGE COFER:

Eighteen months elapsed between the service of process on Mulligan's cross-petition on Mrs. Montgomery and her husband before there was an offer to file an answer to it. No reason was offered for the delay, and this court cannot decide that there was an abuse of discretion in refusing to allow it to be filed.

That answer and cross-petition, being unanswered, established the fact that there was a balance due to Mulligan equal to the sum for which judgment was rendered, and the only question remaining is whether there was error in directing the property to be rented to raise a sum sufficient to pay the balance due to Mulligan for his work and material.

If it be conceded that Montgomery had no power to encumber his wife's property, about which we express no opinion, the chancellor had power under the statute to permit the builder to remove the building; and as a large part of the contract price had been paid, and the rent would discharge the lien in a short time, the appellants were not prejudiced by the order to rent being made instead of an order to permit the building to be removed.

Wherefore the judgment is *affirmed*.

P. B. Muir, for appellants. Russell & Helm, for appellees.

CUMBERLAND & OHIO RAILROAD COMPANY, ET AL., *v.* W. B. HARRISON, ET AL.

[Abstract Kentucky Law Reporter, Vol. 1—411.]

Debts of a Dissolved Corporation.

The dissolution of a railroad corporation does not relieve it from the payment of its debts, but a corporation succeeding to the ownership of such debtor may be made to give up enough of such assets to satisfy such debts.

APPEAL FROM MARION CIRCUIT COURT.

November 20, 1880.

OPINION BY JUDGE PRYOR:

The dissolution of the corporation known as the Cumberland & Ohio R. Co. did not relieve it from the payment of its debts, and after the line of its road had been severed and two distinct corporations created, claiming to own the property rights of the old corporation, it was proper to permit the southern division of the road to defend the action, as the property attached seems to have been claimed by them. If no interest exists on the part of the southern division it has no rights to be determined in this case. The notice of the employment and the writing embracing all its terms is admitted by both the appellants and the appellees; that they performed the services and complied with their undertaking in every particular is clearly established, and if bonds were not issued subsequent to the employment of the appellees as attorneys it was the fault of the appellants, and not that of the appellees. The only question really to be considered in this case is whether this contract between the corpo-

ration and the attorneys was or not champertous? If so, no recovery can be had.

The effect of the injunction and object of the litigation was to restrain the county court of Washington county from issuing any more bonds on the subscription made to the capital stock of the corporation by Washington county. If the contract is to be construed so as to give to the attorneys in payment of their services the bonds of the county, to be thereafter issued in the event the subscription is held valid, it must be regarded as champertous and void. But are these the terms of the contract, and is this court compelled by reason of its letter and spirit to hold the agreement void? That these attorneys were faithful and capable in the discharge of the trusts confided to them is conceded. That they accomplished the purpose in view causing their employment is established clearly, and such a construction of the writing should not be indulged in as will deprive them of all compensation for their services, if susceptible of a different legitimate interpretation.

This record shows that the company had been investing the proceeds of bonds already issued in equipments for the road, and is one of the complaints made by the appellees. That bonds have been issued and placed in possession of the company is admitted, and why by the terms of the agreement these appellees could not look to these bonds for payment, as well as any other bonds that might thereafter be issued, we cannot well see. Bonds had been issued based on a subscription so far as then appeared was legitimate and proper. These bonds were in the hands of the company, or at least this court will not presume that they were all disposed of and placed beyond the reach of the company with a knowledge of that fact on the part of the appellees, and on this state of fact the contract may as well be construed with reference to the bonds already issued as to those the subject of litigation.

The contract as made is not of itself champertous. The appellees were to take Washington county bonds at par, and while the appellees in an amended petition go further in their statements than the contract itself, as to how they are to be paid, the court will nevertheless construe the contract as it is proven to exist, particularly when no champerty is pleaded or proven except the admission that is claimed was made in an amended petition filed by the appellees. It is true the result of the litigation, if favorable to the county court would have rendered all the bonds a nullity that had been previously

issued and in the hands of the corporation; but this incidental effect on bonds already issued that were not in fact in controversy will not justify the conclusion that their validity constituted a part of the litigation, and these parties, in agreeing to accept them, had made a champertous bargain.

While it is doubtful whether or not the appellees could have compelled the company to have paid them in bonds in the event it had tendered the money in lieu thereof, still, it cannot be questioned but that the corporation prior to the institution of this action could have tendered the bonds previously issued to them by the Washington County Court and compelled the appellees to accept them, and the mere fact that title to property already acquired may be or will be affected by a litigation should not be construed as involved in the result with a view of making a contract void, where the parties entered into it in good faith and with no view to violate the law. None of the parties regarded the contract as champertous, and while this may afford no argument for enforcing it, still it does affect the question when the court is invited to leave the contract unnoticed and construe its terms by an admission in the pleading. There was no instruction on this branch of the case below, and none asked or question raised until it reached this court, and while the admission in the attempted pleading is an attempted construction of the contract this court is not disposed to follow it for the purpose of determining an issue that was not raised below. The appellees were only allowed the value of the bonds agreed to be received, and we see no reason for disturbing the judgment, and the case is therefore *affirmed*.

Russell & Arritt, Russell & Houston, for appellants.

W. B. Harrison, W. J. Lisle, William Lindsay, R. H. Rountree, for appellees.

B. H. DUNCAN, TRUSTEE, ET AL., *v.* HENRY DUNCAN.

[Abstract Kentucky Law Reporter, Vol. 1—409.]

Record on Appeal.

When letters are introduced as evidence, and the record on appeal only discloses a part of such letters and portions of each, the Court of Appeals will presume that as the whole of such letters was before the trial court they authorized the judgment rendered.

Judgment Must Follow Petition.

Where in a suit it is prayed that the defendant be directed and required to give a list of personal property received by him as a trustee, and who then has it, there could not legally be a judgment against the trustee either for such property or its value, as no foundation is laid for any such relief.

APPEAL FROM LOUISVILLE CHANCERY COURT.

November 20, 1880.

OPINION BY JUDGE COFER :

The material evidence relating to the alleged gift of the "Figg Money" and the gold watch is contained in the letters of Garnett Duncan and the appellee. Only portions of these letters have been copied into the transcript. The additional schedule directs the clerk to copy "from the original exhibits in the case such parts as are marked in blue which are not already included in the transcript," etc.

Counsel for the appellee cites *Huffaker v. National Bank of Monticello*, 13 Bush 644, and insists that as the whole of each letter has not been copied this court must presume that as the whole was before the court below they authorized the judgment rendered by that court, and in this we think he is right. The letters were filed with and as part of the depositions and each party had a right to read and have considered as evidence every part of each and all that bore in any way on the question at issue, and the whole of each should have been copied.

We perceive no error in the rulings of the court upon the exceptions to the report of the master. This was not a suit for the general settlement of the accounts of the appellee as executor of the will of Garnett Duncan. It was a suit to recover certain specific sums of money and certain property alleged to belong to the residuary legatees, and to be in the possession of the appellee.

The exceptions to the allowance of \$100 to Gibson & Gibson, and to the failure of the commissioner to charge the appellee with \$1,559, and the interest thereon at 10 per cent. from the time he commenced loaning it, were sustained. The commission retained on the 1,400 pounds transmitted to the appellee by the English executor was not sued for.

The letters, or those parts of them which are copied into the deposition of Blanton Duncan, show that the amount in appellee's hands as early as 1871 were accounted for during the life of Garnett Dun-

can to his satisfaction. The 4 per cent. extra interest Henderson agreed to pay was a part of the Figg money and must go with it.

The articles of personal property, except one or two, seem to have been surrendered. The harmonica appears to have been delivered to Mrs. Martin by direction of the testator, and whether as a gift or not the appellee is not responsible for it. Moreover, we do not find that any foundation was laid in the petition to recover it, or any other article of personalty or its value.

The only reference made to personal property is in the amended petition filed February 19, 1876, in which it is alleged "that defendant received some years ago furniture and other property of Garnett Duncan, a part of which defendant has been and is using and will still continue to use with the consent of plaintiffs. Plaintiffs pray that the defendant may be directed and required to give a list of that property, and who has it, so that plaintiffs may be apprised with certitude as to what articles the trustee must account for." This did not authorize a judgment against the appellee either for the recovery of any specific article or its value.

We are therefore of the opinion that the judgment must be affirmed.

B. H. Duncan, for appellants. C. Gibson, for appellee.

JOHN H. BRAND & CO. v. DAVID RUHL.

[Abstract Kentucky Law Reporter, Vol. 1—417.]

Record on Appeal—Presumptions.

When the record on appeal does not disclose how a trial court ruled on a question of law, the Court of Appeals will presume the ruling to be correct, and when it is not shown what ruling, if any, was made on a warranty set up as a counterclaim by the defendant, the court will presume that the plaintiff was liable on his warranty, and that the court deducted as damages what it thought were recoverable.

Measure of Recovery on a Warranty.

The proper measure of a recovery on a warranty on wagons sold is the difference between what the wagons were worth at the time of delivery and what they would have been worth if they had been such as they were warranted to be.

APPEAL FROM JEFFERSON COURT OF COMMON PLEAS.

November 20, 1880.

OPINION BY JUDGE COFER:

Conceding, as we are inclined to do, that counsel state the law correctly in regard to the warranty of the wagons, the result must be the same. Some of the items of appellee's account were denied and others were not, and as to some of those that were denied the evidence was conflicting. It is, therefore, impossible for this court to know how much of that account the court below found to be correct. Suppose he found in favor of the appellee not only the items not denied, but also that were denied, and as to which the evidence was conflicting; this would have entitled the appellee to judgment for a larger sum than that for which judgment was rendered, and as there is nothing in the record to show what the court ruled upon the question of warranty, how can this court know that the court did not find something for the appellants on their counterclaim and deduct it from the amount found for the appellee on his account, and in that way arrived at \$30 as the sum for which the appellee was entitled to judgment.

When the record does not show how the court below ruled a question of law, this court will presume it was correctly ruled, and we must therefore presume that he found the appellee was liable on the warranty, and allowed such damages as he thought were recoverable thereon and deducted it from the amount found for the appellee on his account.

We do not overlook the fact that one of the appellants testified without contradiction that from the time appellee refused to do any more work upon the wagons the worthless nature of his work had necessitated repairs that had cost \$105.45. That was not the criterion of the recovery on the warranty. The criterion was the difference between what the wagons were worth at the time of delivery and what they would have been worth if they had been such as they were warranted to be.

We cannot, therefore, disturb the finding on the ground that the court should have allowed a greater sum by way of damages than the difference between what he was authorized to find for the appellee and the amount for which judgment was rendered.

Petition overruled.

Simrall & Bodley, for appellant. Rodman & Brown, for appellee.

S. H. PILES, ET AL., v. LIVINGSTON COUNTY COURT, ET AL.

[Abstract Kentucky Law Reporter, Vol. 1—413.]

Liability of Sureties on Sheriff's Bond.

A mere extension of time to a sheriff for settlement with the county does not release his sureties on his official bond.

APPEAL FROM LIVINGSTON CIRCUIT COURT.

November 20, 1880.

OPINION BY JUDGE HINES:

This case having been once before in this court all questions as to the sufficiency of the petition are res adjudicata, and will not therefore be considered.

As has been frequently decided by this court a mere extension of time to a sheriff for settlement with the county court does not release his sureties on his official bond. *Helm v. Commonwealth*, 79 Ky. 67.

The matters set up in the amended answer by way of set-off or counterclaim were litigated in the suit of *Livingston County v. Piles, et al.*, and as that judgment stands unreversed it is conclusive of everything placed in issue in that suit. *Davis, et al., v. McCorkle*, 14 Bush 746.

Judgment affirmed.

C. Bennett, J. W. Bush, for appellants.

W. D. Greer, for appellees.

LEWIS EIDSON v. W. F. TATURN, ET AL.

[Abstract Kentucky Law Reporter, Vol. 1—418.]

Ruling on Demurrer—Continuance.

Where the court sustains a demurrer to an answer the defendant is entitled to leave to amend it, and where the court overrules a demurrer to his answer, and during the same term on motion of plaintiff the cause is submitted over the defendant's objection and judgment rendered for the plaintiff, such a proceeding cannot be allowed, and the defendant is entitled to a continuance, for if the demurrer to his answer was properly overruled the cause did not stand for trial at that term.

APPEAL FROM OHIO CIRCUIT COURT.

November 23, 1880.

OPINION BY JUDGE HARGIS:

The court overruled the demurrer to the appellant's answer at the first term after the institution of the suit. Subsequent to this action of the court and during the same term, on motion of appellee, the cause was submitted, and judgment rendered in his favor, notwithstanding the answer of appellant which had been determined by the court sufficient in law as a defense.

If the court had sustained the demurrer, even then the appellant would have been entitled to leave to amend his answer. But the court, after deciding that appellant's answer contained a defense to the action, against his objections and without any indication that the answer was sufficient, submitted the cause and rendered a judgment against him. Thus he was deprived of any opportunity to amend, and forced into a trial with a delusive judgment in his favor upon the demurrer, calculated to mislead him from a discovery of the necessity of amending his answer. Such a proceeding cannot be tolerated. He was entitled to a continuance of the cause, as it did not stand for trial at that term, if the demurrer to his answer was properly overruled. If the demurrer should have been sustained he was entitled to knowledge of that fact by an order of the court, and to an opportunity to amend his pleadings, after the court by its ruling, made manifest the necessity.

The judgment is for the sum of five hundred dollars, with interest at the rate of six per cent. per annum from the 24th day of March, 1877, subject to a credit of one hundred dollars paid June 1, 1878. The petition and bond between appellant and appellee show beyond doubt that this part of the judgment was for \$100 too much. The note sued on was for \$400 instead of \$500.

Wherefore the judgment is *reversed* and cause remanded for further proceedings not inconsistent with this opinion.

J. E. Fogle, for appellant. Townsend & Massie, for appellees.

JAMES M. SHEPHERD, ET AL., v. POLLY SHARP, ET AL.

[Abstract Kentucky Law Reporter, Vol. 1—418.]

Tenant by the Curtesy.

A tenant by the curtesy has the right to hold the land until his death, and the manner of his holding cannot affect the rights of his children by his first wife, who take the land at his death.

Report of Commissioners in Partition.

Where the wife owns an interest in land, and the commissioners in partition in their report say that they have allotted to her husband and herself a certain part of the land, no title is conferred on the husband to any part of such land other than such as he could assert as husband.

APPEAL FROM ADAIR CIRCUIT COURT.

November 23, 1880.

OPINION BY JUDGE PRYOR:

There never was any conveyance made of the land in controversy to Job Sharp. He was tenant by the curtesy and had the right to hold the land until his death, and the manner of the holding cannot affect the rights of his children by his first wife.

The commissioners appointed to divide the land between the heirs of Hood in their report say they have allotted to Sharp and wife a certain part of the land. This did not confer upon Sharp any title other than such as he could assert as husband. The heirs, it seems, after the division made by the commissioners, met for the purpose of executing conveyances or to pass the title to each heir's parcel in one deed.

This conveyance purports to be a conveyance between the heirs of Jesse Hood for the purpose of completing the partition made by the commissioner and of perfecting the title. The conveyance reads: "This indenture made this the 18th of September, 1841, by and between the heirs of Jesse Hood, deceased, viz.: Job Sharp and Margaret, his wife, late Margaret Hood, Patsey Murray, John Hood, Joel Hood, etc." The deed then describes the parcel allotted to each heir and says: "They (the commissioners) allotted to said Job Sharp and Margaret, his wife, containing 140 acres and bounded as follows," etc. After describing each heir's part, the deed concludes: "Now the parties to this deed for the purpose of carrying said division and allotment into effect in consideration of the premises, do hereby sell, transfer and convey the portions allotted to each of said heirs as above described to the person to whom said portion is allotted in said report to them and their heirs forever."

It was necessary that Job Sharp should unite with his wife in order to pass her title to the other heirs, and when they sell and convey the portions allotted to each of said heirs as above described to the person to whom said portion is allotted, they did not include or mean

to include Job Sharp as one of the heirs. They convey to the heirs, and if so, Job Sharp not being an heir, acquired no title. They also conveyed to the person to whom said portion was allotted, using the singular noun, and of course it applied to Mrs. Sharp, who was the heir, and not her husband.

The children by his first wife are the owners of this land and the court should have so adjudged. If their ancestor, Job Sharp has conveyed to them other lands in lieu of this that fact does not appear in the record.

Judgment *reversed* and cause remanded for further proceedings. Whether Mrs. Smith is the owner of the entire tract to the exclusion of Shepherd is not a question before us.

J. R. Robinson, William Stewart, F. R. Winfrey, for appellant.

T. C. Winfrey, for appellees.

MARY M. MYERS v. H. MARCUS, ET AL.

[Abstract Kentucky Law Reporter, Vol. 1—416.]

Lease for Years a Mere Chattel.

A lease for years is only a chattel, and although in the wife's name, not being expressly stated to be for her separate use, is as much the property of the husband as any other chattel acquired in her name.

APPEAL FROM LOUISVILLE CHANCERY COURT.

November 23, 1880.

OPINION BY JUDGE COFER:

A lease for years is only a chattel (see Sec. 13, Chap. 21, Gen. Stat.; *Wilgus v. Commonwealth*, 9 Bush 556), and although in the name of the wife (not being expressed to be for her separate use) is as much the property of the husband as any other chattel acquired in her name.

The leasehold being the property of the husband the improvements upon it are his also, and whether the judgment be right or not it does not affect her property rights, and as she alone appeals, it must be affirmed.

Kohn & Barker, for appellant.

F. Hagan, O. A. Weble, Russell & Helm, for appellees.

J. H. McClymond's Assignee v. James P. Gay.

[Abstract Kentucky Law Reporter, Vol. 1—425.]

Discretion of Trial Court in Setting Aside a Judgment.

When the trial court has a discretion in a matter of practice that discretion will not be interfered with unless it appears to have been grossly abused to the prejudice of the substantial rights of the party complaining.

APPEAL FROM CLARK CIRCUIT COURT.

November 23, 1880.

OPINION BY JUDGE HINES:

It is assigned for error that the court set aside a judgment against the appellee in order to permit him to plead his bankruptcy. It is insisted that this is such an abuse of judicial discretion as calls for revision by this court. Counsel cite us to no case where, under such circumstances, the ruling of the lower court has been revised, but they cite cases where this court has refused to reverse because the lower court refused to allow amendments pleading the statute of limitations. Counsel likens this case to those cited, but it is to be observed that while in those cases this court says there was no abuse of discretion in refusing to allow the defense to be interposed, it is not said that there would have been such an abuse of discretion if the court had permitted it to be put in; and in this case (in analogy with those cited) we would not disturb the ruling of the court below if it had refused to allow the judgment to be set aside for the purpose of interposing a plea that might as well have been sooner presented. Without undertaking to lay down, by this decision, a rule of universal application it is enough to say that when the trial courts have a discretion in matters of practice that discretion will not be interfered with unless it appears to have been grossly abused to the prejudice of the substantial rights of the complainant. Such does not appear to be the case here.

Judgment affirmed.

W. M. Beckner, Geo. B. Nelson, Chas. Eginton, for appellant.

Jas. Flanagan, Houston & Mulligan, for appellee.

MADISON McFARLAND, ET AL., v. JOHN McFARLAND, ET AL.

[Abstract Kentucky Law Reporter, Vol. 1—422.]

Conveyance to Defraud Creditors—Evidence.

In a suit to set aside a deed claimed to have been made as a mortgage to defraud the creditors of the grantor or mortgagor, where it is shown that the mortgagor after the mortgage is executed was always in complete control of it, and the personal property included in it is sold by him at pleasure, and the property is left with the mortgagor, who assumes as the agent of the mortgagee to manage, use and sell the mortgaged property at his discretion, it is strong evidence of fraud.

APPEAL FROM RUSSELL CIRCUIT COURT.

November 23, 1880.

OPINION BY JUDGE COFER:

That Long held the title to appellants' land as mere security for money lent is admitted by all parties, and that an absolute deed is under such circumstances treated in a court of equity as a mortgage does not admit of doubt. As it is not claimed, or if claimed is not shown, that Haynes occupies any more favorable attitude in respect to the land than Long occupied, the only questions we need to consider are whether the money paid to Long by Haynes was his (Haynes) money or was the money of Madison McFarland, and if the money belonged to Haynes whether he paid it to Long and took a bond for title to himself with the intention to assist McFarland in delaying his creditors.

McFarland and Haynes both testify that the money belonged to Haynes. Haynes was successfully impeached by evidence of bad character, and his testimony is inconsistent with his answer, and on some points of importance he is contradicted by Madison McFarland, and by the mortgage executed by the latter to him. For instance, he says in his answer that the mortgage was given to secure money advanced to McFarland, and he testifies that the mortgage was given to secure \$1,040, money loaned "simultaneously with the execution of the mortgage," and that he would not have loaned the money without being secured. The mortgage was given to secure \$867, and Madison McFarland swears that only a part of it was for money loaned at the time, and the residue was for pre-existing debts.

The court below does not appear to have passed upon the validity of this mortgage, but it was put in issue by the pleadings, and the

evidence in regard to it may be properly considered as bearing upon the question of fraudulent collusion.

So far as the testimony of Madison McFarland is concerned it is vague, inconsistent and unsatisfactory. The contract between Haynes and Long was made with his knowledge and consent, and he says that Haynes agreed to let him retain the farm as his tenant as long as he should live. Haynes, his brother-in-law, had previously purchased some of his land sold under execution, and may be assumed to have known that McFarland was indebted to the appellee, and must have known that the contract he was making with Long would obstruct the appellee in the collection of his debt, and in our opinion intended that it should do so. He must have known when sued that he had at most only a lien for any money he may have advanced to Long, but in his answer he asserts title and denies that McFarland has any interest whatever in the land. This, of itself, furnishes strong evidence that he was co-operating with McFarland to keep the land beyond the reach of creditors.

McFarland nowhere gives an intelligent account of the dealings between Haynes and himself. The farm and the personalty seem to have been as completely under the dominion of McFarland as if Haynes had no interest in them. McFarland used and sold the stock embraced in the mortgage at pleasure, and he and Haynes both testify that he had a right to do so. It is true they say he did so as agent for Haynes. But that the property is left with the mortgagor, who is constituted the agent of the mortgagee with power to manage, use and sell the mortgaged property at discretion, is strong evidence of fraud; and the same may be said of the agreement proved by Madison McFarland that he was to have a right to occupy the farm as Haynes' tenant as long as he chose. Haynes was nearly always absent, and no single act of ownership or control over land or personalty, except the act of renting the land, is proved. The evidence shows that McFarland could have sold the land to Miller for \$3,000, and that it was worth more than that, but he would not sell it to Miller for that sum, preferring to allow Haynes to purchase it for \$2,500, for the reason, no doubt, that he hoped that it would be not only thus placed beyond the reach of his creditors, but he might continue to occupy it under his agreement with Haynes.

We are therefore of the opinion that McFarland assented to the sale to Haynes to defraud his creditors, and that Haynes knew the fact and willingly became a party to the transaction in order to aid

McFarland in carrying out his design, and the judgment must be affirmed.

J. F. Montgomery, William Lindsay, for appellants.

J. E. Hays, for appellees.

[Cited, *Sheffield v. Day*, 28 Ky. L. 754, 90 S. W. 545.]

SAMUEL MADDOX v. ALEXANDER WARD, ÉT AL.

[Abstract Kentucky Law Reporter, Vol. 1—421.]

Lien Secured by Pledge.

Where the owner of a note and cattle, being indebted, delivers the same to his creditor as a pledge to secure such debt, and the transaction is bona fide and takes place prior to suit filed in attachment against said pledgor, the lien of the pledgee is prior and superior to the attachment lien.

APPEAL FROM SCOTT COURT OF COMMON PLEAS.

November 23, 1880.

OPINION BY JUDGE COFER:

The evidence shows that the agreement to transfer the note to Eckman was made and possession obtained by the appellees before the appellant's suit was filed, and that Lucas and Turner were informed of the agreement to turn over the cattle to the appellees, and that they agreed to hold them as their bailees also before the suit was commenced. This gave the appellees a lien from the date of the completion of the pledge which, being prior to appellant's attachment, gave them a superior equity.

The writing addressed to Lucas was evidently intended to carry out the agreement between Sudduth and the appellees, and not to place the cattle and note in the hands of Alexander Ward as agent for Sudduth. The depositions of Ward and Sudduth bear upon their face the impress of truth and candor, and in our opinion there are no grounds for holding the transaction to be fraudulent.

The evidence does not show that the appellees have security in Illinois sufficient to secure the indebtedness of Sudduth to them, and we do not discover in the record any fact which would authorize the chancellor to refuse to adjudge to them the benefit of additional se-

curity fairly secured by contract prior to the suing out of appellant's attachment.

Judgment affirmed.

J. F. Robinson, A. Duvall, William Lindsay, for appellant.

Geo. T. Prewitt, Jas. E. Cantrill, for appellees.

ROBERT BRASHEAR *v.* ROBERT A. MORAN, ET AL.

[Abstract Kentucky Law Reporter, Vol. 1—417.]

Estoppel of a Married Woman.

Where a married woman owning real estate sells it, her husband joining her in its conveyance, the wife agreeing that the vendee shall pay a debt of her husband as a part of the consideration, and he either pays such debt or obligates himself to pay it, she is estopped to set up a claim against the vendee for such part of said purchase-money. A married woman must do equity before she is entitled to a favorable consideration in a court of equity.

APPEAL FROM MASON CIRCUIT COURT.

November 23, 1880.

OPINION BY JUDGE HINES:

Mrs. Moran, being the owner in her own right of a tract of land, united with her husband in selling and conveying it to appellant, Robert Brashear, for the recited consideration of \$650. At the time of this sale and conveyance Mr. Moran was indebted to Thomas Brashear by note in the sum of \$325, and it was then agreed by Mrs. Moran, and subsequently acquiesced in by Mr. Moran, that appellant should pay the remaining \$200 to Thomas Brashear on the Moran note, and the deed was so drawn as to show the payment of the entire consideration of \$650 agreed to be paid by appellant. Appellant notified Thomas Brashear that he was directed to pay him the \$200 on the Moran debt, and it being inconvenient to pay at that time Thomas Brashear agreed to wait with appellant until it should be more convenient to pay, and immediately thereafter Thomas Brashear entered on the note of Moran a credit of \$200 as paid by Mrs. Moran. Some four months subsequent to this, Mrs. Moran and husband notified appellant in writing not to pay Thomas Brashear the \$200, but notwithstanding the notice appellant paid the debt to Thomas Brashear, and in this suit by Moran and wife judgment was recovered by them against appellant for the \$200.

It is insisted for appellees, among other things, that Mrs. Moran being a married woman could not contract; that her agreement was without consideration; and that being a promise to pay the debt of another it is within the statute of frauds. Mrs. Moran's liability arises rather out of the doctrine of estoppel than out of contract. If by her direction appellant had paid the money immediately to Thomas Brashear no one would contend that it could be recovered back from appellant, because on the faith of Mrs. Moran's representations and direction, appellant had parted with the money; and the same rule applies when appellant, on the faith of appellee's direction and representations, assumes to pay the money, and that assumption is enforceable against him. At the time the Morans gave the written notice not to pay, the agreement on the part of the appellant to pay Thomas Brashear had become enforceable, for in consideration of appellant's promise to pay as directed by appellees Thomas Brashear had credited the Moran note by the \$200, and thereby cancelled that much of the claim held against Moran. This was not an agreement on the part of appellant to pay the debt of another. It was a promise to pay his own debt which, in consideration of a release from the Morans, he had assumed to pay. *North v. Robinson*, 1 Duv. 71; *Williams v. Rogers*, 14 Bush 776.

The right of the wife to an equitable settlement out of the estate is a doctrine that does not apply to a case like this. She must do equity before she is entitled to a favorable consideration in a court of equity.

Judgment reversed and cause remanded with directions for further proceedings.

G. S. Wall, for appellant.

L. W. Robertson, E. Whittaker, for appellees.

CLARINDA GRAVES v. J. S. TRIMBLE'S ASSIGNEE.

[Abstract Kentucky Law Reporter, Vol. 1—416.]

[Cited, *George v. Hoskins*, 17 Ky. L. 63, 30 S. W. 406.]

Statute of Limitations.

The statute of limitations is a bar to a claim to real estate where the party claiming that she was induced to part with it through fraud first petitions to be made a party to a pending suit concerning it, more than five years after the action was begun, more than five years after she discovered the alleged fraud by which she was induced to sign the deed, and more than ten years after the deed was signed.

Motion to be Made a Party Defendant.

It is not an abuse of discretion for the trial court to deny an application to be made a party to a pending suit which had been pending for eight years, and of the existence of which the applicant had knowledge for seven years.

APPEAL FROM PENDLETON CIRCUIT COURT.

November 23, 1880.

OPINION BY JUDGE COFER :

The petition of the appellant to be made a party to the suit was properly refused. She says that she did not read the deed, that it was not read to her, and that she did not know that she had signed a deed until 1871, at which time she gave a deposition in this action.

She then knew not only that she had made a deed, but that this suit respecting the property was pending. She did not offer to file her petition until in 1878, more than five years after she discovered the alleged fraud by which she was induced to sign the deed.

The statute of limitations presents an insuperable bar to any relief now on account of that alleged fraud, and more than ten years had then elapsed after she made the deed and she was then barred. Sec. 5, Art. 3, Chap. 63, Revised Statutes. Our statute of limitations applies as well in equity as at law, and it is now too late to enter into an argument or cite authority to prove that the limitation of the forum and not of the place where the contract was made or the wrong done is to govern.

We do not mean, however, to be understood as deciding that the statute can be insisted upon as a peremptory bar to a motion to be made by a party, but only refer to it as showing, in connection with the other facts disclosed in the record, that the court did not abuse a sound discretion in refusing to allow the appellant to become a party to a suit which had been pending for eight years, and of the existence of which she had knowledge for seven years.

Moreover, she shows by her petition and the record that Golden had purchased the property nearly eighteen years before she offered her petition, and while she alleges that he knew when he purchased that she had not been paid, she does not allege that he knew anything of the alleged fraud of Foulds in obtaining the deed from her, and therefore his title would not be affected by it even if made out. As the deed is valid as between him and her, even if invalid

between her and Foulds, she cannot reach the land because no lien is retained in the deed.

Judgment *affirmed*.

C. H. Lee, T. C. Buckley, for appellant.

JAMES GARDNER, ET AL., v. JOHN P. SALYERS.

[Abstract Kentucky Law Reporter, Vol. 1—420.]

Liability on Partnership Notes.

When notes of a partnership come by payment and assignment to the hands of two members of a partnership, they cease to have any vitality, and no suit can be maintained on them. Each member of the firm was liable for the whole debt, and when one of them pays the notes he is entitled to credit by the firm, but he cannot sue the firm upon them.

APPEAL FROM MAGOFFIN CIRCUIT COURT.

November 23, 1880.

OPINION BY JUDGE HINES:

When the notes sued on came by payment and assignment to the hands of A. B. Salyers and Farrish Arnett respectively, they being members of the firm by which the notes were executed, the notes ceased to have any vitality as such, and action will no more lie upon the notes than it would in case they had been paid off by the firm. The notes evidenced a joint and several obligation to pay on the part of each and all the members of the firm of Gardner, Arnett & Salyers. Each member of the firm was liable for the whole debt, and when one of them pays the note he is entitled to credit by the firm of what he may have paid, but he cannot sue the firm upon the note, first, because it has performed its office, and, second, because he in any event could recover, after settlement of partnership affairs, only such balance as might be found due him. If the individual member of the firm could have no action against the other members on the notes he could transfer no right of action thereon to another. Appellee took nothing by the assignment as against Gardner and Farrish Arnett.

Judgment *reversed* and cause remanded with directions for further proceedings.

J. & J. W. Rodman, D. D. Sublett, John F. Hager, for appellants.

William Lindsay, for appellee.

[Cited, *Deavenport v. Green River Dep. Bank*, 138 Ky. 352, 128 S. W. 88.]

JAMES T. CLARK *v.* ED CUMMINGS, ET AL.

[Abstract Kentucky Law Reporter, Vol. 1—419.]

Sale of Real Estate for Taxes.

Where there has been no assessment of real estate for taxes no title can pass to the purchaser from the auditor's agent for that reason. Real estate can only be legally assessed in the name of the record owner of title.

APPEAL FROM PENDLETON CHANCERY COURT.

November 23, 1880.

OPINION BY JUDGE PRYOR:

The answer of the appellant discloses the fact that he is attempting to collect several hundred dollars of unpaid taxes, and if the blank in appellee's petition makes it defective the admission by the appellant cures the error. There never has been an assessment of the property, and no title could pass to the purchaser from the auditor's agent for that reason. The assessment by the administratrix, or in her name as such, was a mere nullity. There is nothing in the record to show that it was the legal duty of Mrs. Bradford to pay the taxes, nor anything showing that she had the right to assess it or have it listed in her name. This is fatal to the proceeding by the agent, and would result, if sold, in the purchaser parting with his money without acquiring title.

Judgment *affirmed*.

Clarke & Simon, for appellant. J. W. Edwards, for appellees.

METCALFE COUNTY *v.* J. G. SCOTT, ET AL.

[Abstract Kentucky Law Reporter, Vol. 1—422.]

Release of Sureties by Alteration of Bond.

Where a bond after its execution is materially altered by the erasure of two of the names to it, all the sureties will be released who did not assent to such erasure.

APPEAL FROM METCALFE CIRCUIT COURT.

November 24, 1880.

OPINION BY JUDGE COFER:

The court below was authorized to find from the evidence that the names of John H. Scott and H. S. Luper were erased from the

bond after it was signed by all the sureties except Gill and Cummings, and that this was done without the knowledge of any of the sureties except one, but with the knowledge of the judge and clerk of the county court, and the names of Gill and Cummings substituted for them.

Luper testified that his name was signed without authority, but the sheriff testified he had a power of attorney from both Scott and Luper authorizing him to sign their names as sureties and Scott did not testify at all. The court was therefore authorized to find that both Scott and Gill, and certainly Scott, would have been bound on the bond if their names had not been erased.

The bond when signed was in the hands of the county officials, and continued in their hands without interruption until after the erasures were made. There was a material alteration of the bond which discharged all the sureties who did not assent to it, and it is not proved that any of them did so assent. It seems probable the erasure was made while the court was sitting, but whether so or not it was made by the county clerk, and probably in the presence of the judge, and a surety who happened to be casually present cannot be held to have assented from the simple fact that he made no objection. His consent was not asked, and ought not to be presumed from mere silence.

If it was conceded that the names of Scott and Luper were forged a different question might be presented, but such does not certainly appear to have been the fact, and the other sureties had a right to have their names remain on the bond. If the names had not been erased it may be they would have been held bound, and the other sureties should not have been deprived of the opportunity to test the question. That they were deprived of that right without their consent is sufficient to discharge them, and this applies as well to those who signed before the two names that were erased as to those who signed afterward.

It is true they did not sign on the faith of those names, but they had a right to presume that other names besides their own would be obtained, and when thereafter a name was signed they became at once interested that it should remain to lighten their responsibility to that extent. So far as Gill and Cummings are concerned, they had a right to suppose that the judge and clerk had authority from the other sureties to erase the names of Scott and Luper, and that

all whose names remained on the bond would be bound to share with them in the burdens imposed by it.

The case of *Terry v. Hazlewood*, 1 Duv. 104, differs from this in this one important particular. Stockton's name was shown to have been a forgery, and no alteration was made in the bond, his signature was not erased. In this case it is doubtful whether Scott and Luper were not bound, but the other sureties are deprived of the right to test the question of their liability by the act of the county clerk done with the knowledge of the county judge in erasing their names from the bond.

The other cases referred to are still less analogous to this. Nor is this a case of spoliation by a stranger. The county court was the agent of the obligee, the county of Metcalfe, and in accepting the bond with knowledge that the names had been erased the court approved that act and made it its own, and the effect is the same as if the court had ordered the two names to be stricken off.

Wherefore the judgment is *affirmed*.

Sandige & Allen, John W. Compton, for appellant.

Rousseau & Leslie, for appellees.

M. R. EVERETT v. C. G. RAGAN.

[Abstract Kentucky Law Reporter, Vol. 1—421.]

Sheriff's Return on Summons Conclusive.

Where the plaintiff at law acts in good faith, the sheriff's return on a summons showing that he served it is conclusive against the defendant in favor of the plaintiff, and if the sheriff acts contrary to his duty he is responsible to the injured party.

Grounds for Vacating a Judgment.

Where a plaintiff seeks by suit to vacate a judgment because procured without process served on him, he must allege fraud upon the part of the judgment plaintiff in procuring the return or mistake on the part of the sheriff in making it, and evidence of these facts is not admissible in the absence of such allegations.

APPEAL FROM MONTGOMERY CIRCUIT COURT.

November 24, 1880.

OPINION BY JUDGE HARGIS:

This is an action brought by appellant to vacate a judgment rendered against him by the Montgomery Quarterly Court in favor of

appellee, by default, for unavoidable casualty or misfortune preventing him from appearing or defending. Subsec. 7, Sec. 518, Civil Code.

It appears from the record that a blank printed form of a summons in ordinary, used by the circuit clerk, with "Montgomery Circuit Court" printed on it, was filled up by the quarterly court judge, who is ex officio clerk of that court, by first crossing the printed word "circuit" with the pen and writing the word "quarterly" above it. But in making the copy which the sheriff delivered to appellant, the word "quarterly" was not substituted for the word "circuit."

To the original and copy, the name of the quarterly court judge was signed in his official capacity. The sheriff returned the original endorsed "Executed June 6, 1877, on M. R. Everett, by delivering to him a true copy of the within summons," with his signature thereto.

There is no doubt in our minds that the summons served on appellant commanded him to appear in the Montgomery Circuit Court, but this fact established by the proof is contradictory to the sheriff's return. The question which meets us at the threshold of this case is: Can his return be contradicted in the manner in which appellant seeks to do it?

As to other points raised we do not consider them material under the view we are compelled to take of the question stated. This court held in the case of *Taylor v. Lewis*, 2 J. J. Marsh. 400, that where the plaintiff at law acts in good faith and the sheriff returns the process executed, when in truth it never was, the return is conclusive against the defendant in favor of the plaintiff, and if the sheriff acts contrary to his duty he is responsible to the party injured. To the same effect is the case of *Walker v. Robbins*, 14 How. U. S. 584, and also *Johnson v. Jones*, 2 Nebr. 126.

But it is insisted that under Sec. 17, Chap. 81, General Statutes, the sheriff's return can be attacked for mistake. It is not necessary that we should construe that statute, as the case before us does not raise any question demanding its construction. And without intending to intimate our views upon the question under the statute, we are of the opinion that as the appellant failed to allege fraud upon the part of the appellee in procuring the return or mistake on the part of the sheriff in making it, no amount of proof would avail

him under the well established rule that evidence without averment cannot support a cause of action.

We are therefore constrained to *affirm* the judgment.

Turner & Wood, N. P. Reid, for appellant.

H. C. McKee, J. J. Cornelison, for appellee.

B. KROGER, ET AL., v. ROGER WHEEL CO.

[Abstract Kentucky Law Reporter, Vol. 1—419.]

Jurisdiction of Court of Equity.

In the absence of any lien on property a return of *nulla bona* is necessary to give a court of equity jurisdiction to subject property to a debtor's claim. No cause of action exists in equity in a cause where the creditor has failed to exhaust his common-law remedy.

APPEAL FROM FAYETTE CIRCUIT COURT.

November 24, 1880.

OPINION BY JUDGE PRYOR:

Without passing on the facts of this record as to the question of actual fraud, it is manifest that the case is not within the provisions of the law preventing sales in contemplation of insolvency and with a design to prefer. The mortgagee was not a creditor, and if the transaction was fraudulent no cause of action existed as the appellee had failed to exhaust his common-law remedy.

There was no lien for the appellee's debt created by a levy of an attachment or otherwise on the property of the debtor, and this court has invariably held that to give a court of equity jurisdiction in the absence of any lien a return of *nulla bona* is necessary. Failing to bring the case within the statute presenting a preference of creditors by an insolvent debtor, it seems to us no cause of action was made out or alleged.

Judgment *reversed* and cause remanded for further proceedings.

Z. Gibbons, for appellants. F. Waters, for appellee.

ADAM KRAFT v. PAUL SCHMIDT'S EX'R, ET AL.

[Abstract Kentucky Law Reporter, Vol. 1—419.]

Homestead.

Where the debts evidenced by the several mortgages were created after the improvements had been made and when the appellant was living on the premises, he is entitled to a homestead.

APPEAL FROM KENTON CHANCERY COURT.

November 24, 1880.

OPINION BY JUDGE PRYOR:

The appellant, as the case stood on the pleadings, was certainly entitled to a homestead. The debts as evidenced by the several mortgages of the appellees were created after the improvements had been made and when the appellant was living on the premises. The notes and mortgages being dated after the right to a homestead accrued by the party moving on the premises, it was incumbent on the appellees to show a state of case by their pleadings that would authorize the chancellor, if established, to subject it to the payment of their debts. The execution of the mortgages subsequent to the occupation of the premises by the appellant was not an abandonment of their right to sell the homestead, in the event the indebtedness existed prior to that time; but in order to permit proof upon the state of case it was necessary that the appellees should have alleged the existence of the debt, or such of it as did not exist prior to the improvements made on the premises and its occupation by the appellant.

Judgment *reversed* and cause remanded for further proceedings consistent with this opinion.

R. D. Handy, for appellant.

Tisdale & Dengler, Simmons & Schmidt, for appellees.

LUTHER J. COTTRELL v. DAVID A. BARNES.

[Abstract Kentucky Law Reporter, Vol. 1—422.]

Interest on Note After Maturity.

Where a note is executed on a named day, and made payable one year after date with ten per cent. interest from date, it is error to enter judgment for ten per cent. from the date of the note until a time long after its maturity. Judgment should have been entered for the principal and interest at the named rate for one year and with six per cent. interest thereafter.

APPEAL FROM DAVIESS CIRCUIT COURT.

November 26, 1880.

OPINION BY JUDGE HARGIS:

The note was executed on the 18th day of November, 1872, and made payable one year after date with 10 per cent. interest from date.

The court rendered judgment for 10 per cent. interest from the date of the note until paid, which was error.

The judgment should have been for one thousand dollars with 10 per cent. interest from November 18, 1872, until November 18, 1873, and then with 6 per cent. interest until paid. *Rilling v. Thompson*, 12 Bush 310; *Evans v. Chapel*, 13 Bush 121; *Crosthwait v. Misener*, 13 Bush 543.

Judgment *reversed* and cause remanded for judgment in pursuance of this opinion.

George W. Jolly, for appellant.

EDWARD HESSEY'S EX'R *v.* ELIZABETH C. HESSEY.ELIZABETH C. HESSEY *v.* EDWARD HESSEY'S EX'R, ET AL.

[Abstract Kentucky Law Reporter, Vol. 1—424.]

Liability of Executor and His Sureties.

Where by the terms of a will the interest from a certain sum of money is given to the widow, said sum being given to a husband and wife in a foreign state, and by agreement between said widow and the owners of the fund it is agreed that the husband shall take such money, not as trustee but as owner, and pay the widow the interest each year, and such fund never came into the hands of the executor of the will, he and his sureties are not liable to account therefor, upon the holder and owner of such fund becoming bankrupt.

APPEALS FROM BULLITT CIRCUIT COURT.

November 26, 1880.

OPINION BY JUDGE PRYOR:

Without discussing the various questions made by counsel for the appellant it is evident that the agreement under which the husband of the appellant retained the control of the trust fund precludes her from asserting any claim against the Kentucky executor or trustee and his sureties. The acts of the executors as such terminated with the settlement and distribution of the estate as provided by the will,

and the liability of the sureties on the executors' bond ended at the same time.

The husband of the appellant held this money as trustee only so far as the claim of the widow of the testator could be asserted. The trust was created for her benefit alone, and her consent or surrender of her interest even to the appellant would, if free from fraud or improper influences, have been binding upon her. She was entitled to the interest as long as she lived, and the principal belonged to the appellant and her husband to do as they pleased with. The two could have transferred or sold their interest at any time, and there is no doubt but the husband on the death of the wife, would have been entitled as survivor to her part of the fund. There are no words of exclusion or any separate estate created by the language of the will that would deprive the husband of his right to control it, and when the division of the estate took place, and the agreement was made that the husband and the wife, or the husband for the wife, should take this fund to which they were entitled and pay the interest, it ended the liability of Showalton, if ever liable, to account for a trust fund that had never come into his possession and could not have been reduced to possession against the will of the husband of the appellant, who held it in another state and was also trustee.

There was nothing improper or unreasonable in the husband of the appellant taking the sole control of the money, not as trustee, but as his own, by the consent of the wife, and agreeing to pay the widow the annual interest due. The widow, or any one representing her, is not complaining of this agreement by which she was to look to the husband of the appellant for her money. Showalton had accounted for all the moneys that came into his hands, and when the husband of the appellant became a bankrupt, Showalton, finding that he was indebted to the widow on account of interest and that some of the legatees had not been paid, presented the claim to the extent of the fund received by appellant and her husband as a claim against the bankrupt's estate, and received as his pro rata share the sum of \$2,343.38. He doubtless then thought he was liable to the widow and perhaps for the whole fund; still, an acknowledged liability in express terms would not bind him unless in fact and in law this liability existed.

Having received the fund and it not being sufficient to pay the interest due the widow and the unpaid legatees, it is certain that the appellant had no right to any part of it until their claims were

satisfied. She held subordinate to the claims of the legatees and the widow, and they should be paid before the appellant was entitled to any part of it. They had accepted the fund and it was surrendered with the obligation of the husband of the appellant to pay the interest, and the fund having been presented to the assignee in bankruptcy and the dividend paid the widow should be entitled, certainly, before those whose duty it was to pay it. This fund constituting the balance of the estate after the payment of legacies, the legatees have a prior claim to the appellant. There is no question raised here as to any preference between the widow and the legatees.

The agreement upon which this opinion is based is clearly established by Showalton, Ellaby, Hobbs and others, and independently of the agreement we are not then satisfied that any liability whatever existed on the part of Showalton to the appellant. Her husband had this fund in Illinois when the testator died. He used and controlled it as his own and had this right so long as the widow, who alone was interested, permitted him to do so. The Kentucky trustee never saw or handled the fund. It never was within the jurisdiction of the court, and under such circumstances it would be a harsh rule of either law or equity that would make the faithful trustee account to the recusant trustee for the results of the latter's recklessness in the management of the estate. Such would be in effect the judgment if the appellee were made liable to the appellant.

The judgment is *affirmed* as to the appellant, Elizabeth C. Hessey, and is *reversed* on the appeal of Showalton with directions to dismiss the case in so far as Elizabeth C. Hessey seeks a judgment, in the event the dividend from the bankrupt's estate is insufficient to pay the legatees and the interest due the widow.

R. J. Meyler, F. P. Straus, W. R. Thompson, Badger & English, for Hessey's Ex'r.

R. H. Field, Mann, Calhoun & Frazier, for Elizabeth C. Hessey.

ELIZABETH DARNABY, ET AL., v. W. J. ELLIS, ET AL.

[Abstract Kentucky Law Reporter, Vol. 1—425.]

Will—Construction of Will.

When by the terms of a will the testator devises a certain portion of his estate to each of his sisters, and then devises a certain interest in the estate to the "children of my two brothers," the term denotes that such children take as a class, each set of children taking together the same share as was devised to each sister.

APPEAL FROM BARREN CIRCUIT COURT.

November 26, 1880.

OPINION BY JUDGE PRYOR:

The devise to the children of the two brothers was as a class, and not intended to give them equal interests with the sisters of the testator. We perceive no conflict in any of the clauses of the will on this subject. The language "children of my two brothers" denotes a class, and when considering the relation the testator bore to the devisees all doubt on the subject is removed. The two sisters surviving stood in the same relation to the testator that the ancestors of their children would, if living. They take as a class, and what their ancestors would have taken if the devise had been to the brothers and sisters of the deviser in equal portions.

The case of *Lackland's Heirs v. Downing*, 11 B. Mon. 32, is conclusive of this case.

Judgment *reversed* and cause remanded for further proceedings. *Lewis & Porter, for appellants.*

A. J. STRICKLER, ET AL., v. WILLIAM MCBURNETT, ET AL.

[Abstract Kentucky Law Reporter, Vol. 1—424.]

Wills—Probate of Wills.

Where an alleged will is written upon various sheets of paper, and its probate is contested, the court cannot divide the findings by establishing a part of the will at one time and a part at another time. If certain designated sheets of paper form any part of the will, a verdict is erroneous which finds that certain sheets contain the will, and no finding is made as to the remaining sheets, but since the motion for a new trial was not made in time to permit the Court of Appeals to pass upon such question, the will must stand and the testator be regarded as having died intestate as to that part of the estate not devised in that part of the will established by the verdict and judgment.

Time for Filing Motion for New Trial.

A motion for a new trial must be made at the term in which the verdict or decision is rendered, and within three days after the verdict or decision, except for the cause mentioned in Subsec. 7, Sec. 340, unless unavoidably prevented.

APPEAL FROM HARDIN CIRCUIT COURT.

November 27, 1880.

OPINION BY JUDGE PRYOR:

If the testator had a disposing mind the draftsman of the paper purporting to be his last will and testament seems to have had but little conception as to either the form or substance of such an instrument, but as the court below, by its judgment, has determined what parts of the several sheets of paper constitute the will of the testator, and that judgment is beyond the supervisory power of this court, as the record is presented, it is necessary to pass upon the question as to whether or not such detached parcels of paper could be admitted to probate under any circumstances.

The court told the jury to find that pages 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11 and 12 formed no part of the will of the testator, but they might pass upon the residue of this remarkable paper and determine whether or not it was the last will of the testator, George W. Strickler, under the instructions given. The jury returned a verdict finding that so much of the paper beginning with the words "I do will and bequeath to my grandchildren, George Arnold," etc., and including the codicil, is the last will and testament of George W. Strickler, deceased. On this finding there was no motion for a new trial until the fifth day after the verdict had been returned into court, and therefore this court is powerless to disturb it.

If we can remand the case to have a verdict as to the sheets of paper rejected, and there is a finding in favor of the probate in the county court, then we have two wills for George W. Strickler instead of one. You cannot divide the findings by establishing a part of the will at one time and part at another. If the sheets of paper from 1 to 12 form any part of the will of Strickler then the verdict in this case is erroneous, and as this court cannot determine that question the verdict must stand, and the testator be regarded as having died intestate as to that part of the estate not devised.

The code is imperative as to the motion for a new trial. It must be made at the term in which the verdict or decision is rendered, and within three days after the verdict is rendered except for the cause mentioned in Subsec. 7, Sec. 340, unless unavoidably prevented. There is no pretense that the motion could not have been made, and while the will established may be as far from being the last will and testament of Strickler as the 12 pages rejected, it

must nevertheless stand, the power of this court to reverse being limited by the provision of the code cited.

Judgment *affirmed*.

W. H. Chelf, Hays & Bush, for appellants.

James Montgomery, Wilson & Hobson, for appellees.

JOHN PHILLIPS, ET AL., v. JACOB C. EADES, ET AL.

[Abstract Kentucky Law Reporter, Vol. 1—425.]

Agreed Boundary Line.

Although a boundary line agreed to by parol in 1868 is not enforceable in a contest over it in 1875, yet the fact that it was made furnishes strong evidence that the line agreed upon is the true line. When persons interested in establishing such line, who are not parties to the agreement, were present at least a part of the time it was being run and were fully advised of the purpose for which it was run, made no objections to it, they are to a certain extent bound by it. Good faith required them to make known the fact that they would not abide by the line as run, and the chancellor should not interfere to relieve them by establishing a different line unless the evidence is clear that the agreed line is not the true line.

APPEAL FROM TAYLOR CIRCUIT COURT.

November 27, 1880.

OPINION BY JUDGE COFER:

What is known in this record as the agreed line was run and marked and stones planted at each end in February, 1868, with the admitted consent and agreement of the Phillips on one side and George L. Eades on the other, and with the knowledge of Jacob C., Robert C. Eades and Whitley, and without any objection expressed on their part to the surveyor or to the Phillips.

Soon after the line was run, Phillips commenced fencing and have ever since held up to it. Although Jacob seems to have expressed some dissatisfaction, he took no steps to effectually disavow it until in 1875, when he procured the services of the processioners, and in conjunction with George and Whitley, commenced to run lines and plant stones within Phillips' enclosure.

While the chancellor cannot enforce that agreement even against George Eades, because it was in parol, yet the fact that he expressly made it, and Jacob and Whitley, though present at least a part of

the time and fully advised as to the purpose for which the line was run, made no objection to it, furnishes strong evidence that the line agreed upon is the true line. Good faith required them to make known the fact that they would not abide by the line as run, and the chancellor should not interfere to relieve them by establishing the line further east unless the evidence is clear that the agreed line is not the true line.

The evidence is too voluminous to warrant us in attempting anything like an analysis of all of it. There are not sufficient evidences on the ground to enable the court to say with certainty where the true line is. The deeds to R. C. and John Eades, and from R. C. Eades to Jacob and George, all call for and to run with Gannel's line; and their land is described in the former deed as a part of Allen Gannel's survey.

It is thus made plain that R. C. and John Eades entered under Allen Gannel, and that their eastern boundary was Gannel's line. They do not show that they ever claimed beyond that line, nor do they show with anything like certainty where the line is, or how far east they claimed. There is no proof of a marked or defined line along their eastern border. In their answer they say the line has been in dispute ever since the plaintiffs purchased, and the fact that they undertook to have their land processioned indicated that they did not themselves know the extent to which their lines ran or their true eastern boundary.

The northeast and southeast corners called for in their deed are not found, nor is the location of either established by evidence showing where the corners called for actually stood. They attempt to establish their line not by proof showing where it was actually run, but by commencing at their northwest and southwest corners and running east on one line the distance called for in this deed, and then running the east line south until it intersects the south line, which is extended by this process several poles beyond the distance called for in their deed. Not only this, but they extend their north and south lines several poles east of Gannel's line. The undisputed evidence shows that the point "4" (four) "fallen ash, four beeches and two sugar trees" is a corner to Allen Gannel's patent.

To run the patent call from that point will run the line some distance west of the agreed line, yet this is ascertained to be Gannel's line by the same process that they ascertain the line running S. 25 E. from 8 (eight) to be their deed line. Unless they can show that when

their land was surveyed to them by Taylor the lines were extended beyond the line N. 25 W. from "4" (four) they would be compelled to stop at that line, for their deed calls for it, and cannot go beyond it except by evidence that the lines were actually run to some other point. If they could find their northeast and southeast corners as called for in the deed they might perhaps go to them, although they are east of Gannel's line. But not being able to show where these corners actually stood, nor where the line between them (their east line) actually run, they would be compelled to stop at the Gannel line.

But we think there is enough in the record to show that the agreed line is the true line of Gannel's patent, although the call run from the fallen ash would place it elsewhere. One witness says, in substance, that R. C. Eades told him the line run near the old well, and one or two testify that Gabheart so stated while he owned and occupied the land now owned by Phillips. Another says that when the surveyor was trying to find the Gannel line when the suit between Gabheart and Cabbel was pending in the Green Circuit Court, R. C. Eades and others were present and some of them showed the surveyor where to begin, and from his statement the line then run must have been very near the agreed line R. C. Eades was then living on one side of the line, claiming up to it, and George C. Eades and Gabheart were living on the other side and claiming to the same line, and it is not probable that they would have been mistaken at that day as to the true location of the line. Another witness says that the father of the appellee, Whitley, then an old man, pointed out to him a tree which he said was Gannel's corner, and that that tree stood not far from the northern end of the agreed line.

The deed from Knight to Gabheart, dated in 1838, calls to run with Eades' line 138 poles to a black oak, and thence N. 9 W. 90 poles to a poplar and ash. These latter trees are at "5" on Miller's map. This deed not only serves to show that there is a mistake in the deed from Shively to Phillips and from Nathan Phillips to Shively, and prior deeds for the same land, but that Eades' line is not as far east as they now claim it. All these deeds call to run with Whitley and Eades' line which can only be done by running away from the course called for.

There is no evidence conducing in any considerable degree to prove that Gannel's line is where Eades claims their line to be. They seem to have rested their case mainly upon evidence intended to

show that the Gannel line was not where the Phillips claim it, and upon an effort to show that their deed calls will include the land in contest and that the Shively deed does not include it.

As already intimated, they cannot go east of the Gannel line without showing that their boundary, as surveyed, went beyond it, or that they have claimed to a marked and defined boundary east of that line. As further said they failed to show either that their boundary was surveyed beyond the agreed line, or that they had a marked line beyond it to which they claimed and held.

On the other hand, the Phillips show a possession extending back to 1805, when William Eades is by Caleb Cox proven to have been in possession of the land now claimed by them. The deeds under which they claim all call to run from the poplar and ash, Whitley's corner, with Whitley's line and Eades' line, and all, except that from Knight, call to run to a black walnut, buckeye and sweet gum corner to Eades, and one witness, at least, testifies that R. C. Eades recognized these trees as his corner.

No question is raised in the pleadings as to the line between Whitley and Phillips, or as to the $6\frac{3}{4}$ acres reserved on the south end of the tract conveyed by Shively to the Phillips, and we need not consider any question connected with either.

For the reasons indicated the judgment is *reversed*, and cause remanded with directions to render a decree settling the line between the parties as herein indicated, and establishing Whitley's passway according to the terms of Shively's deed to John and Samuel Phillips.

J. R. Robinson, for appellants. R. S. Montague, for appellees.

WILLIAM P. ADAMS *v.* H. CRAYCROFT, ET AL.

[Abstract Kentucky Law Reporter, Vol. 1—330.]

Replevin.

It is only when the plaintiff asks an order for the immediate delivery of possession of personal property sued for that the affidavit mentioned in Sec. 181 of the code is required.

Allegations in Answer in Replevin.

In a suit to replevy mules from a named defendant and his assignee, where the answer of the named defendant admits that he took possession of the mules, and that he or his assignee had them in possession, these allegations are sufficient to warrant a judgment against the named defendant for the mules if to be had, and if not for their value; but on such averments no judgment should be taken against the assignee because there was no averment that he had the possession of the property.

APPEAL FROM JEFFERSON COURT OF COMMON PLEAS.

November 30, 1880.

RESPONSE BY JUDGE COFER:

The allegation of the answer is that Craycroft took possession of the mules, and that he or his assignee had them in possession. This was sufficient to warrant a judgment against Craycroft for the mules, if to be had, and if not, for their value, and although not sufficient to authorize a judgment against the assignee, because there was no distinct averment that he had them in possession, without which there was no cause of action against him, yet as there was a cause of action against Craycroft, must take his place so far as the cross-action or the judgment rendered thereon will go to extinguish the debt sued for; and while no judgment can be rendered against him for the mules or their value, such a judgment may be rendered against Craycroft, and if the mules be not found their value may be set off against the judgment. The assignee is merely the representative of Craycroft and as such may be affected by the cross-action against his constituent to the extent of the recovery in the original action.

It is only when the plaintiff seeks an order for the immediate delivery of the possession of the property sued for that the affidavit mentioned in Sec. 181 of the code is required. The affidavit there mentioned is the foundation for a provisional remedy, and its allegations constitute no part of the plaintiff's cause of action. It is to be filed in the action, and may be filed after the action has been commenced, and need not be filed at all unless the plaintiff desires an order of delivery *pendente lite*.

Petition *overruled*.

James S. Pirtle, N. T. Crutchfield, for appellant.

Russell & Helm, for appellees.

[Distinguished, *Rennebaum v. Atkinson*, 21 Ky. L. 587, 52 S. W. 828.]

W. L. BROWN *v.* KNOX COUNTY COURT.

[Abstract Kentucky Law Reporter, Vol. 2—58.]

Liability of Sheriff's Sureties.

Sureties on the general bond of a sheriff have the right to claim exemption from liability on account of any default of his touching his duties as collector of the public revenues, or of the county levy or public dues.

Claims Against the County—Duty of County Court.

It is the duty of the county court to levy a sum sufficient to pay all allowed claims against the county at the time of the levy, and to require a bond from the sheriff with sureties worth double the amount of the levy for its collection and payment to the persons entitled, and upon failure to furnish the bond the court should have decreed a forfeiture of his right to longer hold the office.

APPEAL FROM KNOX CIRCUIT COURT.

December 2, 1880.

OPINION BY JUDGE HARGIS:

The county court of Knox, sitting as a court of claims, October, 1873, allowed to J. D. Bolton \$124.50 for services rendered as a jail guard, and ordered the sheriff to pay it and the other claims allowed at that term out of the county levy for the year 1874.

The sheriff collected the county levy for that year, but the county court failed to compel him to execute bond for its collection and disbursement as required by Sec. 4, Art. 2, Chap. 27, General Statutes, or to levy a sum sufficient to pay the whole of the claims allowed by them.

Bolton signed the claim shortly after its allowance to the appellant to whom the sheriff paid \$31.70, but failed and refused to pay the remainder of the claim, he having become insolvent. The appellant presented a copy of the order allowing the claim, with Bolton's assignment endorsed on it, to the court of levy and claims in October, 1877, and moved for its allowance and an order directing the sheriff or collector of the county levy for the year 1878 to pay it. The motion was rejected and he appealed to the Knox Circuit Court, which also rendered a judgment against him, affirming the action of the court of claims, from which he prosecutes this appeal.

It was the duty of the county court to levy a sum sufficient to pay all the claims against the county allowed at the time of the levy

(Art. 2, Chap. 27, Gen. Stat.), and to take a bond from the sheriff with security worth double the amount of the levy, for its faithful collection, and payment to the persons entitled to receive it. Sec. 4, Chap. 27, General Statutes.

By failing to execute the bond, the sheriff would have subjected himself to a forfeiture of his office, if the county court had, as was its duty, required him to do so. It is insisted that the appellant should have sued the sheriff and his sureties on his general official bond. This court, however, held in the case of *Anderson v. Thompson*, 10 Bush 132, that the sureties on the bond executed at the time the sheriff is inducted into office have the right to claim exemption from liability on account of any default of his touching his duties as collector of the public revenues, or of the county levy or public dues of his county, and that as matter of law the sheriff has no right to collect these revenues and levies until he has executed the bonds required.

The court of claims cannot be said to have levied any sum to pay appellant's claim, for there was allowed an excess of claims over the levy made for their payment much larger than appellant's claim when it was allowed. The appellee has therefore made no provision for the payment of this claim, as was its duty. As there is a question about its amount that should have been ascertained and a levy made sufficient to include the unpaid part of the claim in controversy.

Wherefore the judgment is *reversed* and cause remanded for further proceedings not inconsistent with this opinion.

John H. Wilson, for appellant. J. & J. W. Rodman, for appellee.

COMMONWEALTH v. PAT CONNOR.

[Abstract Kentucky Law Reporter, Vol. 2—59.]

Criminal Law—Indictment for Nuisance.

An indictment stated a cause of action when it charged that the defendant wilfully and unlawfully placed a dead and decaying colt on a public highway, and kept it there for three weeks, and that it created great stench and an unhealthy smell to the people passing and having the right to pass over said road.

APPEAL FROM FRANKLIN CIRCUIT COURT.

December 9, 1880.

OPINION BY JUDGE HARGIS:

The indictment charges in concise and plain language that the defendant wilfully and unlawfully placed a dead and decaying colt on a public highway, and kept it there for three weeks, and that it created great stench and an unhealthy smell to the people passing and having the right to pass over said road. These facts as alleged constitute a public nuisance.

Krickle v. Commonwealth, 1 B. Mon. 361; *Commonwealth v. Clarke*, 1 A. K. Marsh. 323; *Gregory v. Commonwealth*, 2 Dana 417; *Ashbrook v. Commonwealth*, 1 Bush 139.

The definite time of committing the act, the injury to the health of the public, and that it was done on a public highway are alleged with sufficient certainty. These acts constitute a public nuisance, as shown by the authorities cited.

Wherefore the judgment sustaining the demurrer is *reversed* and cause remanded for further proceedings consistent with this opinion.

P. W. Hardin, for appellant.

MOUNT STERLING COAL R. CO. *v.* H. COX.

M. H. WARD, ET AL., *v.* H. COX.

[Abstract Kentucky Law Reporter, Vol. 2—60.]

Validity of Stock Subscription.

Where the public have subscribed money to a railroad company for the purpose of aiding it to extend its line of road through the county of which the subscribers are resident, and such line is not constructed, but the company becomes insolvent and is alleged to have abandoned its purpose to construct such road, a subscriber to such company may procure a temporary injunction restraining the railroad company or its assigns from collecting such subscription until the chancellor is satisfied that the company will expend the money in the construction of the road as agreed upon and comply with its agreement, or furnish a bond with surety that it will proceed and complete such road construction.

APPEAL FROM HARRISON CIRCUIT COURT.

December 7, 1880.

OPINION BY JUDGE PRYOR:

The agreement to subscribe stock with a view of extending the Mount Sterling Coal R. Co. to the town of Cynthia was an en-

terprise in which the citizens of Harrison county were deeply interested, and prompted the execution of the paper in which they undertook to pay certain sums of money for that purpose. They were in no manner interested in extending the road east of Mount Sterling at an expenditure of \$65,000 with no prospect of a road from Mount Sterling to Cynthiana. A market for coal was then and is now more accessible and at less cost than its transportation by way of Lexington from Mount Sterling; and, as said in a former opinion involving a kindred question, it was never contemplated by the subscribers of stock in Harrison county that their money should be expended in taking the road from their city instead of bringing it to it. It was a separate subscription of stock, although expressed to be the capital stock of the company. The value of each share of stock was fixed and agreed upon by the subscribers. The amount necessary to pay the expenses and cost of survey was agreed to be paid at once, viz: $2\frac{1}{2}$ per cent on the amount subscribed to carry out the aforesaid object, namely, the construction of the road from Mount Sterling to Cynthiana.

It was right and proper that the original company should make the calls and control the construction of its road, but no right existed on its part to take the money and apply it to the construction of other branch roads, or in extending the main stem in an opposite direction from Cynthiana. The object to be accomplished by the undertaking must be considered in the construction of the agreement, and when this is done there is no difficulty in determining the liability of the parties. If these parties had subscribed to the original stock of the company, a different construction would be given the agreement, but in this case the company had been organized and the road constructed for some distance east of Mount Sterling, and these subscribers of stock said, in effect, to the corporation, "We will give you \$65,000 to be applied in the extension of the road so as to connect the two cities. It was an agreement voluntarily entered into by the citizens alone of Harrison, and presented to the company for its acceptance. It was accepted, and thereby the company undertook to comply with its part of the agreement.

It is now alleged that the company is insolvent, and has transferred or mortgaged its franchise, or the rights acquired under its charter, to others; that it has abandoned the construction of the road from Mount Sterling to Cynthiana and has appropriated what money has been paid to its construction to other parts of the road

and is hopelessly insolvent. Under these circumstances the appellee, who has subscribed thirty shares of stock, asks the chancellor to intercede and prevent its collection. The facts alleged are admitted by the demurrer, and we think the appellants entitled to some relief. Some of the money subscribed has been paid, and while the company is now insolvent it may yet be able to construct the road and comply with the agreement. The chancellor should therefore have granted a temporary injunction by restraining the appellants from collecting the money until he is satisfied the company will expend the money in the construction of the road as agreed upon and comply with its agreement; or a bond with surety to be approved by the court containing such conditions would authorize the dissolution of the injunction at the cost of the appellants. As a matter of course the judgment will not bear interest until there is a readiness and an ability to perform appellants' part of the agreement. The attorneys have a lien on the judgment but are in no better condition than those they represent. When the appellants are in a condition to coerce the money the lien of the attorneys will be enforced, but not sooner.

For the reasons indicated the judgment is *reversed* and cause remanded for further proceedings.

A. H. Ward, C. W. West, J. W. Ward, for appellants.

T. T. Forman, for appellee.

SQUIRE MURPHY *v.* COMMONWEALTH.

[Abstract Kentucky Law Reporter, Vol. 2—61.]

Answer of One Defendant Good as to All.

Where a joint suit is filed against a number of defendants, sureties on a sheriff's bond, and answer is filed by some of them pleading payment, it inures to the benefit of all of such defendants, even in case they do not answer at all; and those defaulted for failure to answer are bound in a judgment rendered in the case the same as though they had answered, but there should be no judgment as to them until there is judgment as to those who answered, when the same judgment should be entered as to them.

APPEAL FROM NELSON CIRCUIT COURT.

December 8, 1880.

OPINION BY JUDGE COFER :

This action was instituted on the bond of James Coy, late sheriff of Nelson county, against him and his sureties in his county levy bond, to recover a balance alleged to be in his hands. Several of the sureties answered and presented a defense which showed that the plaintiffs had no cause of action against any of the sureties. The appellant, who was one of the sureties and had been served with process, failed to answer, and judgment was rendered against him by default before a trial of the issue presented by the answer of his codefendants. That issue was tried on the same day and found for the plaintiffs, but on appeal to this court that judgment was reversed.

The appellant now appeals from the default judgment against him. It does not appear whether the issue made by the answer of the other sureties has been disposed of in the court below or not. The petition presents a good cause of action, and unless the answer presented by the appellant's co-sureties inured to his benefit the judgment must be affirmed.

The opinion in *Rouse v. Howard*, 1 Duv. 31, seems to be conclusive of this question. In that case Rouse sued Howard and Hughey upon the joint and several note of Rouse, Hughey and Coreliss. Rouse failed to answer. Without disposing of the issue made by the answer of Hughey, the court rendered judgment by default against Rouse. Rouse appealed, and this court, in a well-considered opinion, held that "in a joint action against several, a plea of payment by one presents a defense for all." The same principle applies in this case. The answer presented by a part of the sureties showed that the plaintiffs had no right to recover against any one of the sureties, and therefore presented a defense for all.

It does not appear from the transcript before us whether the issue made by the answer has been disposed of. If it has the appellant and the plaintiffs are alike bound by the decision thereon, and judgment should be rendered accordingly. If that issue has not been disposed of no disposition should be made of the case as to the appellant until the issue is tried, when judgment will be rendered for or against him according to the event of that issue.

There is nothing in the record to show that the appellant was deputy for Coy, and as such collected a part of the taxes sought to be recovered, and if there was it would not alter the rights and liabilities of the parties in this action based alone on the bond. Nor

are we prepared to say that he can be made liable to the plaintiffs for any money he may have collected, if in fact no tax was levied by the county court.

Judgment *reversed* and cause remanded for further proper proceedings.

J. W. Thomas, J. C. Wickliffe, for appellant.

C. T. Atkinson, William Johnson, Muir & Wickliffe, for appellee.

R. F. BRANSHAW *v.* J. W. BERRY.

[Abstract Kentucky Law Reporter, Vol. 2—58.]

Libel—Striking Paragraph From Petition.

When there are several causes of action set up in a petition, or one cause is pleaded in two or more paragraphs, the plaintiff may strike out any cause of action at any time, and this will not be an amendment entitling a party to a continuance.

Newly Discovered Evidence—New Trial.

To justify the granting of a motion for a new trial on newly discovered evidence, it must be of a permanent and unerring character, such as to have a decided influence upon the evidence to be overturned.

Instruction as to Damages in Libel Suit.

Punitive damages are always allowed in a suit for slander for damage to one's professional reputation, for the reason that no standard can be fixed by which to measure the damages that may be done to a professional reputation; and hence an instruction embodying such a principle is proper.

APPEAL FROM LEWIS CIRCUIT COURT.

December 9, 1880.

OPINION BY JUDGE HINES:

The petition in this case is unquestionably good. The publication complained of undoubtedly had a tendency to injure appellee in his profession of physician. The objection to the exclusion of evidence is not well taken. The testimony rejected was as to specific acts of misconduct on the part of appellee in regard to which no issue was formed, and was incompetent to affect his reputation or character for chastity.

There was no error in permitting appellee to strike the second paragraph from his petition. When there are several causes of ac-

tion set up in a petition, or one cause of action is set up in two or more paragraphs, the pleader may at any time strike out any cause of action or any paragraph, and such a striking out or discontinuance of a cause of action is in no sense an amendment, which will authorize a continuance. The fact that the opposite party in this instance was surprised does not alter the case. It is not shown how such surprise could have worked detriment to the appellant.

The instruction to find for appellee was correct. There is no evidence tending to establish the truth of the publication complained of. The testimony of appellant as to the conversation with appellee does not show that it had reference to the charges. From all that appears in the bill of exceptions it may have had reference to some other matter of difference between the parties, and as it was not shown to have had reference to this transaction it should have been excluded from the jury. To assume that the conversation had reference to the charges in the publication is to assume the existence of the very thing that must be proved to make out a defense. The evidence of bad character does not apply to the issue as to the truth of the publication, but to the question of damages alone.

There was no error in allowing appellee to conclude the argument, as on the only issue in the case in reference to which evidence was offered the burden of proof was on the appellee. *Daviess v. Arbuckle*, 1 Dana 525; *Young v. Haydon*, 3 Dana 145. The civil code does not alter the rule laid down in those cases.

The refusal to grant a new trial on the ground of newly discovered evidence was not error. In order to justify a trial for newly discovered evidence it must be of such permanent and unerring character as to preponderate greatly, or to have a decided influence upon the evidence to be overturned. The evidence claimed to have been newly discovered is not of such character. Standing alone it would not authorize a verdict for appellant.

The instruction in regard to the measure of damages is not erroneous. In the very nature of the case punitive damages are always allowed in such cases, for the reason, if for no other, that no standard can be fixed by which to measure the damages that may be done to professional reputation in such cases.

Judgment affirmed. Judge Hargis not sitting.

Phister & Hargis, Roe & Roe, Thomas W. Mitchell, for appellant. E. F. Dulin, Garland & Pugh, for appellee.

ELIZABETH CURTIS, ET AL., v. G. B. KINKEAD'S EX'X.

[Abstract Kentucky Law Reporter, Vol. 2—60.]

Description of Real Estate Conveyed.

In construing conveyances the natural objects or monuments called for in the description must prevail over a specific description of that locality contained in the conveyance.

APPEAL FROM FAYETTE CIRCUIT COURT.

December 9, 1880.

OPINION BY JUDGE COFER:

The deed from Harrison to Kelley calls to run back "until it reaches the plank fence separating the lot from the lot annexed to the house on Short street," etc., and then describes the location of the fence as "on a straight line with the northeastern side of an alley which connects the rear of the lot now conveyed with the alley reaching from Main to Short street." The alley here referred to is probably that purchased of Hilton or Hilton & Bradley. This indicates that the plank fence was on an extension of the northeastern line of the alley, and rather tends to preclude the idea that the fence extended along an alley. And such was the fact, whether the fence was on one side or the other of the slip now in controversy.

The question, as it seems to us, is one of fact. Did the fence called for stand on the northeastern or on the southwestern side of the land in contest. The location of the fence must determine the location of the line. If it in fact stood on the southwestern side, the statement in the deed must give way to that fact. *Baxter v. Evett*, 7 T. B. Mon. 329.

The evidence shows without contradiction that at the time the deed was made there was a plank fence on the southwestern side of the alley, or rather on a prolongation of the line of the alley, and that there was no such fence on the northeastern side. In such a case the natural location of the object called for must prevail over the description of that locality as contained in the deed. *Hopkins v. Paxton*, 4 Dana 36.

That the object called for is artificial and not natural does not alter the rule. Each is but evidence of the actual abutments. One

may furnish a higher degree of evidence than the other, in ordinary cases, but in this case there is no room to doubt that the plank fence and the only plank fence on the prolongation of the Hilton & Bradley alley was on the southwest side; and the case is as strong as if the call had been to a tree on the line with the northeastern side of the alley and to run thence to another tree also on a line with the alley, and it had then been stated that both trees stood on a straight line with the northeastern side of the alley. In such a case it would hardly be contended that if the evidence showed clearly and without contradiction that the trees stood on a straight line with the southwestern side of the alley that the grantee would be entitled to hold to the northeastern side.

The coal houses could hardly have been described as a plank fence, and especially in view of the fact that there was a fence only four feet from them which, had the intention been to run the coal house, would at once have suggested the necessity to describe the line as running to the houses and not as running to the fence. Nor does the use of the words "and also the alley", etc., militate against this conclusion.

As already intimated the deed does not describe nor refer in terms to an alley separating the lot sold to Kelly from that sold to Kinkead. The statement that the plank fence is on a straight line with the northeastern side of the alley tends to exclude the idea that the fence run along the alley referred to, and consequently leads to the conclusion that the alley intended by the words, "and also the alley which connects," etc., is the alley lying between the lot now owned by Thompson and Boyd and that owned by Goodloe.

But when the deeds are viewed in the light of the parol evidence, and of the evident design of Harrison in purchasing the Hilton alley, we incline to the opinion that the alley extending from the engine house to Bank alley should be treated as an easement to both lots.

The judgment accords with these views, and is *affirmed*.

Buckner & Allen, for appellants. Geo. W. Darnall, for appellee.

KENTUCKY CENTRAL R. CO. *v.* WILLIAM E. WELLS.

[Abstract Kentucky Law Reporter, Vol. 2—60.]

Bill of Exceptions—Time for Filing.

The law prior to the Act of 1878, amending Subsec. 2, Sec. 337, Civil Code of 1877, required that the party excepting should at the close of the trial, unless further time be given him, prepare his bill of exceptions, and this was required to be done during the day on which the trial terminates, or the judgment becomes final. A trial held before the Act of 1878 came in force is governed by the former law, and a bill of exceptions tendered on May 4, when the motion for a new trial was overruled on May 1, 1878, is not in time and does not become a part of the record on appeal.

APPEAL FROM MASON CIRCUIT COURT.

December 9, 1880.

OPINION BY JUDGE HARGIS:

The first objection made by appellee to the appeal is that there is no bill of exceptions showing what transpired before the jury on the trial.

The action was brought in September, 1877, a judgment had for the appellee, and the motion for a new trial was overruled, May 1, 1878. On the 4th day of May thereafter appellant tendered his bill of exceptions, which was then signed and made part of the record.

In *Scott v. Burrows*, 13 Bush 450, this court decided under Subsec. 2, Sec. 337, Civil Code of 1877, that the party excepting shall at the close of the trial, unless further time be given him, prepare his bill of exceptions, etc. This must be done sometime during the day on which the trial terminates, or the judgment becomes final.

The Act of 1878, amending Sub-sec. 2, Sec. 337, was passed subsequent to the trial herein, and it is held by the court in *Yeatman v. Day*, 79 Ky. 186, that it does not apply to cases wherein judgments were rendered and exceptions filed before the act was passed. To that extent the act is unconstitutional. See *City of Louisville v. McKegney*, 7 Bush 651; *Barnet v. Barnet*, 15 Serg. and R. (Pa.) 72.

It therefore follows that the bill of exceptions is not legally before this court, and the errors assigned cannot be considered in the absence of a bill of exceptions.

Wherefore the judgment is *affirmed*.

W. H. Wadsworth & Sons, for appellant.

E. C. Phister, for appellee.

URIAH S. HENDRIX *v.* H. M. BUCKNER'S HEIRS.

[Abstract Kentucky Law Reporter, Vol. 2—60.]

Title by Adverse Holding.

Where in a suit to recover real estate it is shown that the land claimed by the plaintiff is within a prior patent boundary under which he claims the defense must fail unless it appears that no entry or possession was had by plaintiff and those under whom he claims within such patent boundary; but where it does appear that no such entry was made the defendant may have acquired title by a continuous adverse holding for fifteen years before the bringing of the action.

APPEAL FROM PENDLETON CIRCUIT COURT.

December 9, 1880.

OPINION BY JUDGE PRYOR:

It seems to us, from the facts as they now appear in the record, the only question to be determined in order to settle this disputed boundary was whether the land in controversy was in Thornberry's patent boundary or Taylor's; in other words, if in the boundary of Thornberry the defense must fail unless it appears that no entry or possession was had by the appellees and those under whom they claim within the patent boundary. If no such entry was made the appellees may have acquired title by an adverse holding. There is no pretense of any claim by the appellees outside of the boundary of Thornberry's patent.

The second instruction given at the instance of the appellant, but modified by the court, took from the jury the right of determining the question as to boundary by telling them that, although the land was outside of the Thornberry patent, the appellees could recover. This was doubtless an oversight on the part of the court and counsel; still it is urged by the appellant here that it did influence the verdict, and whether so or not, as the instruction is found, the appellees are permitted to recover, although the land is not within the boundary of their patent.

The instruction is,—That if the land in controversy is within the boundary claimed by the appellant, and he and those under whom he claims have been in the possession claiming to own it continuously for fifteen years before the bringing of the action, they should find for him unless they believe at the date of the deed and entry said land was in the adverse possession of plaintiff, or those under

whom he claims, or unless they believe said entry and possession for said time was outside the boundary of Thornberry's patent.

The court evidently intended to say that if outside of the Thornberry patent the appellees could not recover; but the instruction is so worded as to mislead the jury. Other objections have been made to the rulings of the court, but as the question of boundary is the real question in the case, and the appellees have shown title within the Thornberry patent, we cannot see in what way the appellant has been prejudiced. Copies of the ancient deeds made by those having the custody of such records, when the original cannot be produced, should be permitted to go to the jury; and in fact we are not prepared to say that the copies are not properly authenticated. The other questions raised have not been considered.

Judgment *reversed* and cause remanded for further proceedings.

W. J. Perrin, W. W. Ireland, for appellant.

J. H. Fryer, P. J. Denham, for appellees.

COMMONWEALTH *v.* WILLIAM SKEETERS, ET AL.

[Abstract Kentucky Law Reporter, Vol. 2—59.]

Suit on Common-Law Bond.

A common-law obligation can only be proceeded upon in a court having civil jurisdiction.

APPEAL FROM HARDIN CIRCUIT COURT.

December 9, 1880.

OPINION BY JUDGE HINES:

The demurrer to the petition in this case was properly sustained. If the bond is good for any purpose, and we think it is not, it is good for only a common-law obligation, and can be proceeded upon only in a court having civil jurisdiction. The jurisdiction of the Hardin Criminal Court was exclusively criminal, and this being a civil proceeding there was no jurisdiction. *Morgan v. Commonwealth*, 12 Bush 84.

Affirmed.

Hardin, for appellant. Montgomery & Poston, for appellees.

[Cited, *Brown v. Commonwealth*, 2 Ky. L. 214.]

COMMONWEALTH v. WILLIAM HARDIN.

[Abstract Kentucky Law Reporter, Vol. 2—59.]

Criminal Law—Indictment for Indecent Exposure of the Person.

To authorize a conviction for indecent exposure of the person the act must have been committed in a public place. If it is indictable for one to expose his person to two persons in a private place, still it is no offense to do so at the request or with the consent of such persons.

APPEAL FROM HARDIN CIRCUIT COURT.

December 9, 1880.

OPINION BY JUDGE HINES:

To authorize an indictment and conviction for indecent exposure of the person the act must have been committed in a public place. It must be an act affecting the public directly. If there was any doubt as to whether the indecent exposure to two persons in a private place would be indictable there can be no doubt that it is not indictable if the exposure is so had at the solicitation or with the consent of the persons to whom the exposure is made. 1 Bishop on Criminal Law, Secs. 244 and 1125.

The indictment in this instance does not allege that the exposure of the person, which was in the presence of two other persons, was made in a public place, nor that the exposition was made without the consent of those witnessing it. The demurrer was properly sustained.

Judgment *affirmed*.

Hardin, for appellant. Montgomery & Marriott, Montgomery & Poston, J. P. Hobson, for appellee.

CHARLES SEMPLE v. C. L. HILL.

[Abstract Kentucky Law Reporter, Vol. 2—64.]

Instruction at Appellant's Request.

An appellant cannot complain of an instruction given at his request, and the fact that a similar one is given at the request of the defendant affords no ground for a reversal, even though erroneous.

APPEAL FROM JEFFERSON COURT OF COMMON PLEAS.

December 9, 1880.

OPINION BY JUDGE PRYOR:

The instruction complained of by the appellant, or the one controlling the action of the jury, was given at his instance, and the fact that a similar instruction was given for the defendant affords no ground for a reversal, although erroneous. We do not see, however, that any valid objection can be urged to the instruction given. Both the knowledge and assent of the appellant to the agreement between Morse and the appellee were necessary to be established in order to defeat the recovery, and if the appellant knew of the agreement and permitted Hill to create the account from time to time without objection is a fact from which the jury might infer his consent to the arrangement.

The testimony, we think, is ample showing that appellant both knew and consented to the sale of the goods as agreed upon between Morse and Hill. The other objections urged are merely technical and could in no manner have affected the substantial rights of the parties.

Judgment *affirmed*.

W. O. & J. L. Dodd, for appellant. L. McQuown, for appellee.

REID & STONE *v.* PAT PUNCH.

[Abstract Kentucky Law Reporter, Vol. 2—62.]

Lien of Attorneys.

A claim in litigation both before and after judgment is subject to an attorney's lien in the hands of the debtor, and such a lien cannot be defeated by the defendant paying the amount of the judgment to the plaintiff.

Amount of Attorney's Fee.

Where no amount is agreed upon as the fee of an attorney he is entitled to a reasonable fee.

APPEAL FROM MONTGOMERY CIRCUIT COURT.

December 11, 1880.

OPINION BY JUDGE HARGIS:

Boyd held a senior mortgage for \$500 and the appellee a junior mortgage for \$800, on the same house and lot. The former instituted suit to foreclose his mortgage and the latter employed the ap-

pellants, Reid and Stone, to file his answer and cross-petition for the subjection of the house and lot to the satisfaction of his claim also. Judgment was rendered for the amount of their respective debts, and the sale of the property to pay them in the order of priority.

The appellee became the purchaser and executed bonds with surety for the amount of Boyd's judgment, a lien being reserved in the bonds on the land till their payment, but did not execute any bond for the remainder of his bid, amounting to \$421.85, because he was the owner of the judgment to which it was applied.

The appellants moved the court to allow them \$50 for their services, and to endorse the same as a lien on the judgment in favor of appellee and the house and lot purchased by him. This motion was overruled, and from this order they prosecute this appeal. The amendment to Chap. 4, Art. 1, Revised Statutes, found in Myers' Supp., 685, gave to attorneys a lien upon judgments for money in actions prosecuted by them to recovery.

In construing the amendment this court held in *Stephens v. Farrar*, 4 Bush 13, that it operated to render the claim in litigation both before and after judgment subject to the attorney's lien in the hands of the debtor; and that an attorney's lien could not be defeated by the defendant who satisfies the judgment by paying its amount to the plaintiff and taking his receipt for it.

In the light of this decision, construing the statute as it then stood, it appears that the lien on a judgment attached to the claim and reached the subject out of which the judgment on it should be realized, giving to the attorney control of the judgment to the extent of his fee in exclusion of his client and ungoverned by the defendant.

Section 15, Art. 1, Chap. 5, of the General Statute, provides, in substance, among other classes of claims and demands, that in any action, whether employed by plaintiff or defendant, which is prosecuted by an attorney or attorneys to recovery, they shall have a lien upon the judgment for money or property, either personal or real, which may be recovered in said action for the amount of an agreed or reasonable fee for their services.

By this section the attorney's lien was widened so as to embrace judgments not only for money, but for personal or real property. Under the former statute mentioned the plaintiff could not defeat the attorney's lien by receiving the money on his judgment. Now, can he, under the present statute, defeat a lien on a judgment for

money and a sale of real property, on which the judgment is a lien, by becoming himself the purchaser and receiving the property without paying the purchase-money?

The requisites necessary to give to an attorney a lien under the clause of the section above cited are: 1. That he shall be employed in an action; 2. And that he shall prosecute it to recovery. Both of these things have been done in this case.

On what, then, does the attorney's lien rest? It is primarily upon the judgment, either for money or property, whether the property be personal or real. Thus, the statute fixes the character of judgments on which the lien exists. While the lien was limited to judgments for money we have seen the money could not be divested from the payment of the lien. Since it has been extended for judgments for personal or real property we think the property should be subjected also to the lien. The lien is on the judgment and embraces its incidents. The judgment is the vehicle through which all the liens attached to it reach the subject out of which the judgment can be satisfied and the liens discharged.

The spirit of the statute is not to give a lien in form upon the judgment which would amount to nothing more than a "naked ideality," if clients were permitted to become possessed of the fruits of the judgment without paying the laborer his hire, but to reach the money and property subject to the judgment and thus vitalize the lien and give it substance on which to survive.

The attorney with a lien has an interest in the judgment, and before inferior lienholders are satisfied he must be paid out of the property subject to the judgment, by the recovery of which he entitles himself to a part of his client's claim, equal to the sum of his fee, together with the securities and property in lien for its payment. His fee represents so much of his client's claim, and as between him and his client his rights are superior by reason of the statute; but as against others he takes no greater interest than the client had.

The judgment of Boyd is a superior lien upon the property until his debt shall be paid, and the appellee's lien would have remained upon the property until his part of the purchase-money had been paid, if another had purchased. In that case the attorney's lien would have been superior to his. The appellant's lien, after they recovered the judgment, belonged to them as much and was as distinct as Boyd's lien, and the appellee could not, by collecting the

money, if another had purchased, nor by possessing himself of the property under his own bid, destroy their lien upon the property.

Before he can keep the property and enjoy the results of the labor of his attorneys he must pay them a reasonable fee for their services, no amount being agreed upon between them.

Wherefore the judgment is *reversed* and cause remanded for further proceedings consistent with this opinion.

Reid & Stone, for appellants. O. S. Tenny, for appellee.

WILLIAM H. REDDIN, ET AL., *v.* THEODORE SCHWARTZ.

[Abstract Kentucky Law Reporter, Vol. 2—63.]

Vendor's Lien—How Lost.

Where vendors having a lien unite with the vendees and transfer the property to a third party a corporation, it becomes subject to the corporate debts, and it is then too late for the vendors to assert liens as against the creditors of the corporation.

APPEAL FROM LOUISVILLE CHANCERY COURT.

December 11, 1880.

OPINION BY JUDGE PRYOR:

The whole of the property in question, by the act of organization made on the 1st of February, 1866, was transferred to and became a part of the capital stock of the corporation known as the Beargrass Turnpike Company. The conveyance of the same date to these appellants or their assigns was made to enable them to become stockholders and part owners in the enterprise. The vendors, Roberts and Hohn, convey seven-tenths of the property to the appellants, and then all of these parties transfer the same to the Beargrass Turnpike Company. The vendors, having a lien, unite with the vendees in transferring the property to a third party, the corporation, and by an express provision of its charter the property of the corporation is subject to its debts.

It is now too late for the vendors to assert liens as against the creditors of the corporation. The subscriptions to the corporation were fully paid, and the conveyance made to the appellants for that purpose. The shares of stock were paid for in the land or estate conveyed, and no lien being retained as against this third party (the corporation) the chancellor acted properly in subjecting the prop-

erty to the payment of the appellee's debt. The corporate shares of stock were unencumbered, and we think this was the manifest purpose of the parties. The shares of Hohn and Roberts certainly had no lien resting upon them, and we see no reason why these shares should be held liable and not the others. The books show the indebtedness of the company to the appellee, and his judgment is based upon it. There is no reason why this company should not pay its debts. We have not examined the charter to see whether by a special clause the property of the company may be sold for its debts. It is a fact not controverted by counsel, and therefore the court will assume that such is the charter.

The judgment is *affirmed*.

O. A. Wehle, Bigger & Davie, William Mix, E. E. McKay, Clemmons & Willis, for Appellants. L. M. Dembitz, for appellee.

THOMAS RANEY *v.* COMMONWEALTH.

[Abstract Kentucky Law Reporter, Vol. 2—62.]

Criminal Law—Forgery.

The mere verbal direction of the trial judge to discharge the prisoner does not discharge him. This could only be done by an order of record.

APPEAL FROM MADISON CIRCUIT COURT.

December 14, 1880.

OPINION BY JUDGE COFER:

The punishment inflicted in this case, although the smallest that could be imposed under the statute, is disproportioned to the offense. The appellant is proved not to be able to read or write, and of course did not forge the order. Nor does the evidence show that he knew it was forged, except by inference from the fact that it was forged, and he presented it and represented that it had been given by Hunter. But it was for the jury, and not for the court, to say whether that inference was warranted by the facts.

The mere verbal direction of the judge to discharge the prisoner did not discharge him. No order was entered directing his discharge, and it is only by the record that such matters may be shown; and if such an order had been entered and set aside before the pris-

oner left the bar we should not be inclined to hold that it would discharge the prisoner.

The court properly refused to permit any inquiry into the question whether any evidence was heard by the grand jury by which the indictment was found. A careful scrutiny of the entire record has failed to detect any error for which this court is authorized to reverse the judgment, and it is *affirmed*.

Morse & Chenault, for appellant. Hardin, for appellee.

THOMAS G. CORNELIUS, ET AL., v. B. K. TULLY.

[Kentucky Law Reporter, Vol. 2—204.]

Right of Church to Borrow Money.

The deed to a church declared that the land should be held for the use of the members of the church according to the rules and discipline agreed upon and adopted by the ministers of the church at their general conference; and one of the rules adopted is that if the trustees holding the property for church purposes have advanced money or become responsible for such money, and pay it, they may sell or mortgage the property to pay or secure the debt. It is held that the church property is liable for a debt due a trustee who has paid the contractor for erecting the church and where the trustees were required to borrow money to pay such contractor and have to pay interest thereon, the interest becomes a proper charge upon said church also.

APPEAL FROM LOGAN CIRCUIT COURT.

December 14, 1880.

OPINION BY JUDGE COFER:

The erection of the church building was directed by the proper authorities of the church. No limitations or restrictions were placed on the building committee. They had power to erect the house they did erect; it has been regularly received; and the record does not show that any person, lay or official, objected on the ground that the house was finer or more expensive than was authorized or desired, until long after it was completed and paid for.

The debt to the appellee may not have been contracted with the consent of the church authorities, but the debt to H. B. Tully was so contracted. The appellee was one of the trustees and a member of the building committee, and had the right to pay the debt of the

church to the contractor and thereby make the church his debtor. The provision of the Book of Discipline quoted in the petition, and admitted in the answer, authorizes the trustees to mortgage the property to pay the debt, or to sell it for that purpose. This they refused to do, and they now insist that the courts have no power to enforce the payment of the debt, because the land on which the house stands is dedicated, by the deeds under which it is held, to the worship of God.

The deed declares the land shall be held for the use of the members of the church "according to the rules and discipline which from time to time may be agreed upon and adopted by the ministers and preachers of the said church at their general conference," etc. One of these rules is that if the trustees holding property for church purposes have advanced money, or shall be responsible for any sum of money on account of church property, and shall pay it, they may sell or mortgage the property to pay or secure the debt. This made it the duty of the trustees to sell or mortgage the property to pay or secure the debt, if any, due to the appellee, and having failed to do so the chancellor will treat as done that which ought to have been done, and enforce the debt against the property as though a mortgage had been made.

June 11, 1873, the building committee borrowed of a bank in Russellville \$2,000, and paid it to the contractor, and in July, 1874, the appellee and others borrowed of Miller \$1,213.33 in gold, for which they gave their note bearing ten per cent. interest. The gold was sold and the proceeds applied as payment on the debt to the bank which was bearing interest at the rate of twelve per cent. The appellee has paid off that note, and he also paid off the balance of a note given by the building committee to the contractor, amounting to \$159.95. These sums constitute the basis of his claim.

But it is contended that the building committee had no authority to borrow money and pay interest, and that, deducting the amount subscribed and collected to pay for the building from its costs, there is only a small balance remaining unpaid, if anything, and that the committee must lose the interest paid by them on borrowed money. It is also contended that the appellee did not pay his own subscription of \$600 until long after it was due, and that this failure made it necessary, if it was necessary at all, to borrow money, and that even if the committee had authority to borrow money the appellee ought

to lose the interest, payment of which was made necessary by his default in paying his subscription.

The contract for building the house was made April 30, 1873. The work was to be commenced May 12, and to be finished as soon as practicable. The price was to be paid in weekly instalments as the work progressed, except 25 per cent., which was to be paid when the work was completed. The work was completed prior to March 28, 1874, when the house was received, and the committee's note given for \$745, the balance remaining unpaid. The subscriptions were payable one-fourth on September 1, 1872, one-fourth December 1, 1872, one-fourth March 1, 1873, and one-fourth June 1, 1874.

There is nothing in the record showing when the several subscriptions were collected, and in the absence of such showing it ought to be assumed that the building committee acted honestly and faithfully, that enough was not collected to meet their obligation to the contractor, and that they borrowed the money from the bank because the subscribers did not pay in their subscriptions as fast as the money was required. The members of the committee were themselves large subscribers; they were members of the church, and had no interest to increase the cost of the building by unnecessarily borrowing money at a high rate of interest, if they had money in hands with which to meet their obligations to the contractor.

The appellee paid off the note given by the building committee to the contractor. When this was done does not appear, but the church has never paid any interest on it, and none is claimed except on the balance after deducting from it the \$53 the contractor owed the church, and \$532.10, balance of appellee's subscription. So, if appellee was in default at all, it was only as to \$532.10, from March 1, 1873, when the whole became due, to March 28, 1874.

But no money was borrowed until in June, 1873, and if he accounts for interest on the sum of \$532.10, at the same rate that was paid to the bank from the time the money was borrowed, to March 28, 1874, no hardship or loss will result from his failure to pay his subscription when due. The circuit court allowed him for interest on borrowed money at six per cent. The evidence shows that ten per cent. was paid. The appellants complain that any interest was allowed, and the appellee by cross-appeal complains that he was not allowed all the interest paid.

If it had been shown that the subscriptions had been or ought to

have been collected in time to meet the demands of the contractor, or if there was evidence sufficient to show that the committee acted recklessly or unfaithfully, there might be strong reasons for refusing to permit them to charge the church with any part of the interest they have paid. But in the entire absence of such evidence, we agree with the counsel for the appellants that all or none of the interest paid should be allowed. Having contracted to pay the contractor weekly as the work progressed, they were bound in good faith to him to keep their promise, and a failure to do so might have subjected them or the church to heavy losses.

Under such circumstances it was their duty to borrow money, if it was not paid by the subscribers, and the right to pay interest was a legal incident to the right to borrow. The court should therefore have allowed as a charge against the church all the interest paid by the building committee to the bank, and by the appellee to Miller, deducting from it interest at the same rate on the balance of the appellee's subscription as before indicated.

The sums paid for steps and for stone slabs and washing down and penciling the walls should also be charged to the church. It may or may not be true that they were embraced in the contract to build the house. That is not a question now. The building committee recognized these things as extra work and paid for them. The committee was the agent of the church, and it is bound by their action.

The purchase-money paid to Lyon was a debt of the church, and was paid out of the fund in the hands of the building committee, and reduced by that amount the sum remaining to pay to the contractor; and the appellee having advanced money by borrowing, it is difficult to see upon what principal of equity the church can refuse to reimburse him; and if this were not so, the debt to Lyon was a debt against the church property and has been paid by the committee, has not been reimbursed, and is a charge against the property under that portion of the discipline quoted above.

The private accounts between appellee and Henry Cornelius have nothing to do with this controversy. There is no proof of an agreement on the part of the committee or of appellee to accept his services in buying and driving cattle as payment of his subscription, and if the services be proved there was no error in rejecting the charge as against appellee, in this controversy between him and the church.

The statute quoted (Sec. 5, Chap. 13, Gen. Stat.) has no applica-

tion to a proceeding to subject church property to sale to pay the debts of the church. It only applies when the church or its trustees seek a sale for their own purposes.

The judgment is *affirmed* on the original and *reversed* on the cross-appeal, and the cause is remanded for judgment in conformity to this opinion.

R. S. Brevier, for appellants.

James H. Bowder, Charles S. Grubbs, for appellee.

JOHN VENDERHIDE *v.* COMMONWEALTH.

Criminal Law—Murder.

It is not error to overrule an application for a continuance of a murder trial made by the accused to another term of the court, when much less time would be required to prepare his defense; nor is it error to refuse an application for a continuance on account of an absent witness where it does not appear that the facts sought to be proven by him are material, and where the accused is not injured in his defense by the fact that such witness does not attend or testify.

APPEAL FROM SHELBY CIRCUIT COURT.

December 16, 1880.

OPINION BY JUDGE COFER:

At the last September term of the Shelby Circuit Court the appellant was found guilty of the murder of Rebecca Johnson on the 21st day of July last, and sentenced to be hanged. He was defended by counsel assigned by the court, and they prosecute this appeal for their client in the hope that they may in a manner compatible with law save him from the awful doom which otherwise awaits him.

They urge but a single point, viz.: That the court erred in overruling a motion for a continuance of the prosecution. This was asked upon two grounds: 1. That his first appearance to the indictment was on September 13, when, having no counsel, counsel were assigned him by the court; that he was on the same day remanded to prison in Frankfort, thirty-seven miles from the place where his counsel resided; that he had no money to pay the expenses of his attorneys from their homes to the place where he was confined; that he had been kept there until the day preceding that on which his motion was made and had no sufficient opportunity to confer with his counsel; that there were various matters connected with his

defense which he had no opportunity of communicating to his attorneys, and which it would be improper to state in the affidavit; and that he believed that in consequence of these facts his attorneys could not possibly have prepared his defense in a proper manner, and that he could not safely go to trial.

He further stated that he was informed that testimony would be offered by the commonwealth to show that, on the morning the deceased was killed, he (the prisoner) went through the town of Brownsboro in the direction of the place where the killing occurred; that he then had on a shirt; that in a short time he returned to Brownsboro and then had on no shirt; that a shirt was afterward found hidden near the place where the deceased was killed; and that he was informed he could prove by one, Joseph Hightsman, who lived in Jefferson county, that when he (the prisoner) returned to Brownsboro he had on a shirt.

The court awarded an attachment against Hightsman returnable forthwith, and overruled the motion for a continuance to which the prisoner excepted. At the conclusion of the evidence for the commonwealth Hightsman was not present, and it appeared that a special bailiff sent after him had not been able to find him; and the prisoner then again asked the court to continue the cause, or to require the attorney for the commonwealth to admit that the fact which he had stated in his affidavit he could prove by Hightsman was true.

The court overruled both these motions and the prisoner again excepted. It was not necessary that the cause should be continued until another term in order to enable the prisoner to confer with his counsel. This could have been done in a much shorter time, and we do not doubt that the court would have allowed a reasonable time for that purpose if asked to do so. *Gambrel v. Commonwealth*, 23 Ky. L. 502.

The evidence for the commonwealth conduced to show that the prisoner passed through the town of Brownsboro early on the morning on which the deceased was killed, going in the direction in which her body was found, and that he then had his coat on his arm and had on a shirt. It also showed that some hours later he returned to Brownsboro, and then had on a coat which was buttoned up and had a handkerchief around his neck.

While there he made inquiries of Joseph Hightsman, and then went toward Beards Station, where he was arrested, and it was at

that place, and not at Brownsboro, at which the commonwealth's evidence conduced to prove he did not have a shirt on.

In view of this evidence it was not material whether he had on a shirt when he returned to Brownsboro or not, and he was not prejudiced by the absence of Hightsman, or by the refusal of the court to require the attorney for the commonwealth to admit the truth of the statement in the affidavit as to what Hightsman would swear.

The evidence, although entirely circumstantial, was so conclusive as to leave no room for any doubt of his guilt, and we are therefore compelled to *affirm* the judgment.

Judge Hargis dissenting.

Ben S. Robbins, D. H. French, for appellant.

P. W. Hardin, for appellee.

CHARLOTTE S. NELSON ? JAMES H. NELSON, ET AL.

[Abstract Kentucky Law Reporter, Vol. 2—63.]

Will—Construction of Will.

A testator provided as follows: "I give and bequeath to James Nelson's children * * * one equal portion of my estate, * * * but their father is to occupy, manage and control the said portion for them during his life, and then a division shall be made between said children, but he is not to dispose of or sell any portion of it; nor is he to be responsible for any profit or use of said portion, nor is said portion nor any interest or profit of the same to be liable for his debts in any event." It was held that such terms created in the son a life estate.

Construction of Provisions in a Will.

If two provisions of a will are repugnant the later will be preferred as expressing the intention of the testator.

APPEAL FROM CLARK COURT OF COMMON PLEAS.

December 16, 1880.

OPINION BY JUDGE HARGIS:

The fifth clause of the will of Wm. H. Nelson, under which the appellant claims that James H. Nelson, the son of the testator, took a life estate, is in these words:

"I give and bequeath to James Nelson's children that he now has, or may hereafter have, one equal portion of my estate, that is, the same portion my son would have received. They are to take toward

that portion the farm on which they now reside. If that is more than their portion, then they are to pay back to my estate any overplus. This portion is given to my son's children, but their father is to occupy, manage and control the said portion for them during his life, and then a division shall be made between said children; but he is not to dispose of or sell any portion of it; nor is he to be responsible for any profit or use of said portion; nor is said portion nor any interest or profit of the same to be liable for his debts in any event."

What interest, if any, has James H. Nelson in the farm mentioned, which is shown by the record to contain 218 acres? In the beginning he makes a general devise to the children of his son of the portion he would have received, and gives them the farm in question toward that portion, requiring them to pay back to his estate the overplus if the farm should be more than their portion. He then repeats that "this portion is given to my son's children."

After that he wills that their father is to occupy, manage and control the said portion for them during his life, then a division shall be made among said children. The occupancy, control and management of the farm were secured by the will to his son during his life by the express language of the will, and in order to prevent any disturbance of his occupancy, control and management the testator directed, in effect, that a division of the land should not take place among the children of his son during his life. The children could not, therefore, obtain possession during their father's lifetime.

He was given complete control of the farm, exempted from payment or responsibility for any use or profit that might arise during his life by reason of his occupancy, management and control of the farm. This occupancy was certainly intended to be exclusive, else the children would have been given some right of joint occupancy with him. The word "occupancy," as used in the will, is equivalent to the word "possession."

If he had intended the children to have had any interest in the use or profits, in order to maintain or educate them, why did he without regard to their age or condition forbid a division to take place during their father's lifetime, although he may live until all of them are beyond 21 years old and far advanced in life? It is a significant fact that for this anticipated long continued occupancy, provided for the father, no responsibility was to be incurred by him for any use or profits. Could the creditors of the children subject the use and

profits during their father's life to their debts? Certainly not, because they belong to the father, and he cannot be made responsible for them, although he and no one else can receive them. Adverse of the use and profits for life is a life estate. *Bowles v. Winchester*, 13 Bush 1.

The reservation by a grantor of the use and control of the granted premises during his life creates in him a life estate with all its incidents. Washburn on Real Property (6th ed.), Sec. 222. While the land is devised to the children, and the occupancy, management and control thereof given to the son for them, yet in a subsequent part of the clause the testator secures the control and occupancy to his son during his life, and for that period gives him the use and profits for which he is exempted absolutely from all responsibility. He has, therefore, devised the use, profits and control of the land to his son during his life, and we think it creates in him a life estate.

The provisions contained in this clause of the will seem to be repugnant unless the control, management and occupancy "for them" means that he shall manage the farm during his life in a husband-like manner. That is, he shall not commit nor permit waste of any kind which the children would have the right to restrain. But if two provisions of a will are repugnant the latter shall be preferred as expressing the intention of the testator. 2 Blackstone Commentaries, 381; 1 Redfield on Wills, 443. In the case of *Wykham v. Wykham*, 18 Vesey 395, the court said that "of two inconsistent limitations in a will the latter prevails."

We cannot think this will, taken in all of its parts and construed, creates any trust for the children by the words "for them" used in the words quoted. *Sharp v. Lain*, Mss. Opin., 1884. The intention of the testator was to give this son, for some reason, what was equivalent to a life estate, but not by the usual words in which such estate is created, and imposes upon it conditions which would protect it from his creditors. While the son is exempted from liability for the use or profits the testator declares that the profits shall not be liable for his debts.

The manifest object of the testator was to give to the son the use and profits, but place them beyond the reach of his creditors. It has been held repeatedly that such provisions in a will or deed are void. *Samuel v. Ellis*, 12 B. Mon. 479; *Samuel v. Salter*, 3 Met. 259; *Cosby v. Ferguson*, 3 J. J. Marsh. 264; *Eastland v. Jordan*, 3 Bibb 186; *Pope's Exrs. v. Elliott*, 8 B. Mon. 56.

The construction we have given the will excludes the idea that any trust was created by it for the children in the use and profits of the land during their father's life. Words, to create a trust, must be imperative on the donee of the trust, and if they confer a mere power or authority and leave entirely at his discretion to apply or not the gift to the designated purpose, no trust will be created. Hill on Trustees, side page 66.

Wherefore the judgment is *reversed* and cause remanded for further proceedings consistent with this opinion.

Geo. B. Nelson, L. Hathaway, for appellant.

Breckinridge & Shelby, for appellees.

WILLIAM E. GLOVER'S EX'R *v.* MYER & HAY.

[Abstract Kentucky Law Reporter, Vol. 2—68.

Reported in full, 3 Ky. L. 181.]

Liability of Subscriber for Railroad Stock.

A subscriber for stock in a railroad company is released from his subscription by a subsequent alteration of the organization of the company when such alteration is fundamental and not contemplated by the charter or the general law; but his liability remains if the alteration or amendment is accepted by the subscriber, and his acceptance may be either by express action or by his acquiescence. Especially is this true in a contest between a creditor of the company, after the subscription is made, and the subscriber for stock.

APPEAL FROM LOUISVILLE CHANCERY COURT.

December 16, 1880.

OPINION BY JUDGE HINES:

In 1867 the Elizabethtown & Paducah R. Co. was chartered and authorized to construct a railroad from Elizabethtown to Paducah. To the capital stock of this company appellant made an unconditional subscription of \$2,500, on which he paid two calls. Subsequent to this, in March, 1868, the charter was amended, and among other things the company was authorized to build branch roads. In 1873 the charter was again amended, and the name of the company changed to the Louisville, Paducah & Southwestern R. Co. Under the amendment of 1868 the company constructed a branch road from Cecilia to Louisville. Appellees were contractors in the building of this branch, and having obtained judgment against the company and had execution returned no property found, they instituted

this proceeding in equity to subject the unpaid portion of the subscription made by appellant's testator.

Without alleging fraud or mistake appellant seeks to escape liability on the ground that certain conditions were attached to the subscription, and upon the further ground that he was released by the amendments to the charter which undertook to change his contract with the Elizabethtown & P. R. Co., and which amendment he alleges he did not accept. The allegations of appellant's answer is that the amendment of 1868 was obtained without his consent, and that when the company accepted it he refused to pay any more on his subscription. There is no charge that appellant did anything more to manifest his disapproval of the amendments than stated until the filing of the answer in this case in 1878.

It may be conceded that a subscriber for stock is released from his subscription by a subsequent alteration of the organization of the company, when such alteration is fundamental and not contemplated by the charter or by the general law. But whatever the alternation may be, the liability for the subscription remains if the amendment effecting the alteration is accepted by the subscriber to the stock, and that acceptance may be manifested by acquiescence as well as by express acceptance. Especially is this true in a contest between one who becomes a creditor of the company, subsequent to the subscription, and the subscriber for stock. When the amendment, as in this case, is accepted by the majority of the stockholders, and the company proceeds to act under it, good faith to the company as well as to those dealing with it requires that the nonassenting stockholder should make known his nonacceptance of the amendment in an unequivocal and public manner.

In this instance it is not charged that notice was given in any way to the public of the nonacceptance, nor in fact to the company. The only charge in the answer from which an implied notice to the company could be inferred is that, after the amendment, appellant refused to pay his subscription. Under these circumstances those dealing with the company had a right to presume an acceptance of the amendment on the part of the stockholders, and to look to the unpaid subscriptions as a fund out of which their claims were to be satisfied. This is unlike a case where there is no acceptance of an amendment to a charter by the company itself through its corporate organization. Before an amendment is binding upon the company in its corporate capacity there must be either a formal acceptance or

conduct under the amendment by which the acceptance of the company is made manifest; but where the company, as such, formally accepts an amendment and acts under it, the presumption is that the stockholders individually approve and accept the amendment.

Judgment *affirmed*.

Judge Cofer not sitting.

John Roberts, for appellant.

D. W. Sanders, D. M. Rodman, for appellees.

ECKSTEIN, NORTON & Co. v. MYER & HAY.

[Kentucky Law Reporter, Vol. 2—124, as *Eckstein v. Meyer*.]

Validity of Mortgage on Railroad Company's Assets to Secure Bonds.

The rule that sales of personal property not accompanied by possession are void does not apply to mortgages and deeds of trust.

Mortgage to Secure Bonds Includes Unpaid Subscriptions for Stock.

Where a railroad company, to secure the payment of bonds issued to pay for construction, executes a mortgage on its road bed, franchises, rolling stock, securities and evidences of debt to a trustee, such a mortgage will include unpaid subscriptions for the stock of the company; and a judgment creditor causing execution to issue and securing a return of no property found cannot, in a court of equity, have such subscriptions subjected to pay his judgment.

APPEAL FROM LOUISVILLE CHANCERY COURT.

December 16, 1880.

OPINION BY JUDGE HINES:

Pending the construction of the Louisville, Paducah and Southwestern Railroad, that company, in order to secure the payment of bonds issued to pay for construction, executed to appellants, as trustees, a mortgage on its roadbed, franchises, rolling stock, securities and evidence of debt, and provided that the property should remain under the control and in the exclusive use of the company until default in the payment of the bonds, or of the interest thereon. Subsequently appellees obtained judgment against the company for a large amount, and having execution returned "no property," instituted this action to subject certain unpaid subscriptions to the stock of the company. From the pleadings it appears that the mortgaged property, except the stock subscriptions, had been sold under

decree of the circuit court of the United States, and as to the subscriptions, the proceedings in that court had been dismissed without prejudice.

The questions arising on this appeal are: First, Did the charter of the company authorize the mortgage on the unpaid subscriptions? Second, Did the provision in the mortgage authorizing the company to use and enjoy all of the mortgaged property until default of payment invalidate it? Third, Did the decree of the circuit court of the United States determine the question as to the rights of the parties to the unpaid subscriptions?

The charter provides that, to secure the prompt payment of the bonds and interest, the company may execute a mortgage or deed of trust, conveying the "railroad, its property and franchises," with such covenants therein "as may be necessary to affect the purpose and objects of its execution."

The manifest design of the statute was to enable the company to raise money to construct and equip the road, and to that end to place in lien all the securities belonging to the company. Considering the end to be accomplished, the presumption is that the means best suited to that purpose would be adopted, which, of course, would be to put in lien all the assets of the company instead of only a portion, as contended by counsel for appellees. This is not a case for the application of the maxim *expressio unius est exclusio alterius*. The statute uses generic terms, without words of exclusion, which are broad enough to embrace the unpaid subscriptions. In the case of *Bardstown & Louisville R. Co. v. Metcalfe*, 4 Met. 199, this court held that, from the authority to borrow money, there was an implied power to mortgage even the franchises of the company. The case of *Gratz v. Redd*, 4 B. Mon. 178, does not authorize the construction contended for by counsel for appellees. The charter, in that case, used specific terms to designate the property that might be embraced in the mortgage, and, by the use of the expression "all their stock laid out and expended on said road," by implication excluded the idea that the stock not so laid out and expended should be embraced in the mortgage. The provision in the mortgage that the property should remain in possession of the company until default in payment of interest or principal of the bonds does not invalidate it.

Whatever the law may be elsewhere, it is well settled in this state that the rule that sales of personal property not accompanied by pos-

session are void does not apply to mortgages and deeds of trust. Whenever the possession under the mortgage or deed is consistent with its object, and consistent with good faith and fair dealing, the conveyance is not void. *Vernon v. Morton*, 8 Dana 247; *Lyons v. Field*, 17 B. Mon. 544; *Ross v. Wilson*, 7 Bush 29. Our registration laws necessarily contemplate that the possession of personal property mortgaged shall remain with the mortgagor. Otherwise they are ineffectual to confer any rights, and an actual pledge becomes essential to enable one to use personal property as a security. The possession may be of such character as to be evidence of fraud, but it is not *per se* fraudulent. In this instance the possession is entirely consistent with the avowed object, which is, to secure the bondholders who have advanced their money on the faith of this agreement with the company, and of which appellees are presumed to have had notice. The security furnished by the mortgage may not be of as high a character as the mortgagees would have had if possession had been immediately taken of the property; but there was, nevertheless, some security; and the transaction being free from fraud in fact will be upheld.

It appears to us that the decree of the circuit court of the United States determines nothing in regard to these subscriptions. It is said that the suit as to this matter was dismissed without prejudice, which, if true, as we are compelled to conclude, leaves the question an open one as much as if there had been no proceedings instituted in the United States court.

Judgment *reversed* and cause remanded, with directions for further proceedings.

Chief Justice Cofer not sitting.

H. C. Pindell, for appellants.

D. W. Sanders, D. M. Rodman, for appellees.

JAMES SMITH v. MARION BURBRIDGE'S COMMITTEE.

[Abstract Kentucky Law Reporter, Vol. 2—65.]

Amendment of Sheriff's Return on Execution.

A sheriff cannot legally amend his return on an execution made more than three years after the original endorsement, to enable the sheriff to collect his half commission by reason of his having levied the execution before the judgment on which it was issued was suspended.

APPEAL FROM SCOTT CIRCUIT COURT.

December 16, 1880.

OPINION BY JUDGE PRYOR:

This was a motion by the sheriff of Scott county to amend his return on an execution made more than three years after the original endorsement, with no other view than to enable the sheriff to collect his half commission by reason of his having levied the execution before the judgment on which it was issued was suspended. The original return reads: "Stayed by the execution of a supersedeas." More than three years after this the officer proposes to amend by stating that he levied the execution on the land of the debtor. This comes too late, and while the sheriff in this particular case no doubt acted in good faith it is a precedent that, if established, would result in injury to litigants and invite such officers to amend returns for the purpose of advancing their own interests; and while the facts of this particular case furnishes no proof of bad faith on the part of the officer, the lapse of time must be held as conclusive against him, and the circumstances relied on for not making the return in the first place as furnishing no excuse for the delay.

Judgment *affirmed*.

James E. Cantrill, for appellant. W. S. Darnaby, for appellee.

DAVID JOHNSON v. COMMONWEALTH.

[Abstract Kentucky Law Reporter, Vol. 2—67.]

Criminal Law—Confessions.

When the record on appeal in a criminal cause fails to disclose the circumstances under which the statement in the nature of a confession of the prisoner was made, the Court of Appeals will presume they were such as made the evidence competent.

Instructions as Ground for New Trial.

When in a murder trial some instructions are given and others are refused, and the defendant by his grounds for a new trial assigns the giving and refusing of certain named instructions, and the instructions given are correct and those refused were properly refused, a new trial cannot be granted on the ground that instructions should have been given upon other points.

APPEAL FROM HICKMAN CIRCUIT COURT.

December 16, 1880.

OPINION BY JUDGE COFER:

The bill of exceptions does not show the circumstances under which the statement of the prisoner to Simmons was made. There is enough to show that he then had the prisoner in custody, but this does not necessarily exclude the confessions. It may have been made under circumstances such as to render it competent, and as the record does not disclose the circumstances, we must presume they were such as made the evidence competent.

Instruction "A" correctly presents the law of murder. There was no instruction in the law of self-defense. None was asked, and no complaint was made in the motion for a new trial that the court had failed to properly instruct the jury. The grounds were that the court erred in giving instruction "A" and in refusing instructions 1, 3, 5 and 8. No notice was thereby given that the defendant complained that no instruction was given in respect to self-defense. The objections were specific and did not authorize a new trial upon any other ground.

It has often been decided by this court that it is the duty of the trial court to give to the jury the whole law of the case, that is, the law applicable to the whole case as it is developed in the evidence. But when instructions are given and others refused, and the defendant by his grounds for a new trial assigns the giving and refusing of certain named instructions, and the instructions given are correct and those refused were properly refused, a new trial cannot be granted on the ground that instructions should have been given upon other points. The questions and only questions raised by the grounds for a new trial in this are: First, Was instruction "A" correct? and, second, Were instructions 1, 3, 5 and 8 incorrect? Finding both of the questions ought to be answered in the affirmative, it was the duty of the court to overrule the motion for the plain reason that neither of the grounds assigned for a new trial could be sustained.

It is not claimed in the brief of appellant's counsel that his instructions should have been given, and it is clear that they were properly refused. The evidence of the appellant's confession was not the only evidence tending to connect him with the commission of the crime. The evidence conduced to prove that the appellant was killed by being beaten over the head with a hard, round instrument, and that there was a round hole broken in his skull. The evidence conduced to prove that on the evening on which the homicide was com-

mitted the accused was seen with a round piece of iron, which he seemed to be using as a walking stick. A round piece of iron answering that description was produced on the trial. A physician who examined the wounds on the head of the deceased testified that they might have been made with that piece of iron, and especially the round hole in the skull. This evidence was not objected to. Another witness testified that the iron looked like the one she saw the prisoner have only a few hours before the homicide. This was a sufficient corroboration of the confession to authorize the court to give the case to the jury.

We may remark that the evidence of the decrepit condition of the deceased is sufficient to disprove and exclude all pretense that the killing was done in self-defense. The deceased was about 60 or 65 years of age, was paralyzed in one side, and had a crippled leg and arm and walked on a crutch. That a young man could have killed such a person in the open street in his necessary self-defense by repeated blows over the head with a heavy iron pipe is preposterous. There is no evidence that the deceased was armed.

Judgment affirmed. Judge Hargis dissenting.

Jacob White, for appellant. P. W. Hardin, for appellee.

[Cited, *Hathaway v. Commonwealth*, 26 Ky. L. 630, 82 S. W. 400.]

APPERSON'S EX'X v. NANCY M. HAZELRIGG.

[Abstract Kentucky Law Reporter, Vol. 2—64.]

Liability of Trustee—Burden of Proof.

Where it is shown that property came into the possession of a trustee the burden of proof is on him to show that it was accounted for and paid out.

Revival of Action.

In an action against a defendant who dies during its pendency it may be revived against his personal representative with demand or affidavits being previously made.

APPEAL FROM MONTGOMERY CIRCUIT COURT.

December 17, 1880.

OPINION BY JUDGE HARGIS:

Some time before the proceeding in which the judgment appealed from was rendered William Hoffman was appointed the trustee of

the appellee, and executed bond with R. Apperson, Jr., and Thomas Turner as sureties. The record shows that the sum of about \$6,736.29 came to the hands of Hoffman as trustee, but what he paid out does not appear. The appellee in her affidavit states that the balance was \$5,000 on the 15th day of December, 1877, and the affidavit is not denied by the appellant.

Besides this, the burden of proof is upon the appellant to show that her testator's principal had paid or accounted for the sum which was shown to have gone into his hands as trustee. Prior to the 15th of December, 1877, a rule was awarded the appellee against Hoffman and his surety, Apperson, to pay the trust fund into court, and on that day the court refused to make the rule absolute because the exact sum in the trustee's hands was not shown, but ordered the trustee to pay to the appellee \$500 then and \$500 on the first day of April, 1878, adjudging also that she was the absolute owner of the trust fund, and that the rule was a proper proceeding to enforce its payment into court. The court also referred the matter to the master commissioner to ascertain the balance in the trustee's hands.

The surety, Judge R. Apperson, Jr., died on the 22nd day of January, 1878, and thereafter on the 26th day of November, 1878, the appellee caused notice to be served upon the appellant as executrix of R. Apperson, Jr., deceased, to revive said rule against her. In response to said notice appellant appeared and objected to the revivor because no demand of the claim was made on her before the service of the notice. Her objection was overruled and she excepted.

The appellee then filed her affidavit in the ordinary form, purging her claim, etc., also the affidavit of Judge B. J. Peters, stating that her demand "is just and correct," and moved to submit the rule, which was done and judgment rendered against appellant for \$1,000, part of the trust fund in the hands of Hoffman, with 6 per cent. interest from the date of the judgment, to be levied of assets, and re-committed the cause as to the trust fund to the master to ascertain the remainder in the hands of the trustee, Hoffman, who had become insolvent, and from that judgment this appeal is prosecuted.

The trust fund was created, Hoffman appointed trustee, executed bond, and this proceeding by rule was instituted, heard and adjudged in the case of *Thomas F. Hazelrigg's Adm'r v. Thomas F. Hazelrigg's Heirs*, for the settlement of his estate and allotment of dower. The trust fund was awarded to the appellee in lieu of dower. The

chancellor has power over the fund to compel its proper management; and on account of the insolvency of the trustee and his failure to pay the sums which were ordered to be paid to the appellee, it was the chancellor's duty to order and compel the payment of the trust fund into court or to the appellee, who is entitled to it absolutely.

No affidavit or demand was necessary to be made before notice to revive the rule, which is in the nature of an action. The rule was served upon Judge Apperson. In fact, he was in court and objected to the issuance of it and in the proceedings under the rule the court had power to render judgment for the trust fund found in the hands of the trustee. In an action against a defendant who dies during its pendency it may be revived against his personal representative with demand or affidavits being previously made. *Matthews v. Jones*, 2 Met. 254. So in the case of a rule upon the final determination of which a judgment may be rendered.

It was proper and necessary for the appellee to make her affidavit purging and setting forth her demand and produce that of another witness proving it before judgment. This was done. We think the affidavit of Judge Peters that the demand "is just and correct" is equivalent to saying he knows it is just and correct, because he could not truthfully swear that it was just and correct without he knew those things to be true. His affidavit means more than his belief that it is just and correct.

As to the error assigned that the judgment was not for the whole amount that may be due we do not think it is available. The record fully sustains the judgment for the amount adjudged. Because the trustee's accounts were in such a state, and because, from his failure to properly report the condition of the trust, the court could not tell the exact amount of the trust fund in his hands, it forbore to render judgment for but \$1,000, although the claim presented and proven was \$5,000, and the truth of appellee's affidavits were not denied. While the court acted prudently in referring the cause to the master to ascertain the balance or amount of the trust fund, it might have gone further without leaving any legal ground of complaint of its action.

The judgment, if prejudicial to any one, is not prejudicial to the rights of the appellant. Wherefore the judgment is *affirmed*.

Reid & Stone, for appellant. B. J. Peters, for appellee.

[Cited, *Marshall v. Sanford*, 9 Ky. L. 355.]

JAMES BRIDGEFORD & CO. v. GEORGE W. NEWMAN.**Power of County Court to Prescribe the Duties and Fees of Officers.**

An act purporting to vest in the county court of a county power to prescribe the fees of the sealer of weights and measures is unconstitutional, and such fees paid to such officer may be recovered back. The power to prescribe such fees is a legislative power, and under our constitution cannot be delegated by the general assembly to the county court.

Compensation of Public Officers.

An officer is not entitled to compensation for official services rendered by him unless there is a law which specifically gives him a fee or salary. No promise is implied on the part of those for whom he renders services to pay him for them.

APPEAL FROM JEFFERSON COURT OF COMMON PLEAS.

December 18, 1880.

OPINION BY JUDGE COFER:

Certain acts of the general assembly purport to confer upon the county court of Jefferson county power to prescribe the duties and fees of the sealer of weights and measures for that county. It is claimed by the appellants that the power to prescribe the duties and fees of a public officer is legislative in its nature, and cannot be delegated to the county court.

In our opinion there are two insuperable objections to the validity of such statutes, viz: 1. They violate that principle of American constitutional law, which forbids the legislature to delegate to any tribunal or body those powers which are by the constitution delegated to that body. 2. They violate that provision of the constitution of this state which declares:

Sec. 1. "That the powers of the government of the state of Kentucky shall be divided into three distinct apartments, and each of them be confided to a separate body of magistracy, to wit: Those which are legislative, to one; those which are executive, to another; and those which are judiciary, to another."

Sec. 2. "No person, or collection of persons, being of one of those departments, shall exercise any power properly belonging to either of the others, except in the instances hereinafter expressly directed or permitted."

Sec. 1, Art. 2. "The legislative power shall be vested in a house

of representatives and senate, which, together, shall be styled the general assembly of the commonwealth of Kentucky.

The sealer of weights and measures of the county of Jefferson is a public officer of that county; and we do not understand his learned counsel to deny that the power to prescribe his duties and regulate his fees is legislative in its character. But they contend that the county courts in this state have always been invested with powers, some of which are judicial, some executive and some legislative in their nature. They refer to statutes empowering the county courts to establish ferries and fix the tolls; to grant tavern licenses and fix tavern rates, and to establish public roads and keep them in repair, as instances, and claim that the acts relating to the sealer of weights and measures can be sustained upon the same principles.

There are other instances in which these tribunals have been invested with powers not in their nature judicial. *Pennington v. Woolfolk*, 79 Ky. 13. But there are instances in which a long continued practice of the government has ripened into an authoritative construction of the constitution which the courts have felt compelled to respect. They commenced long before the adoption of the present, and some, if not all, before the adoption of the second constitution.

The construction given to the constitution by the enactment of statutes conferring these powers upon the county courts must have been known to the convention and the people, and the adoption of Art. I, of the present organic law, in the very language of the Constitution of 1799, was a virtual, if not an actual, adoption of that construction.

But the readoption of that article also shows that the principal embodied in it was regarded as salutary, and that it was intended that it should have some effect. While it must be conceded that the acts conferring these powers are constitutional, although in apparent conflict with the organic law, yet it must also be conceded that the power of the legislature to confer upon the county courts powers not judicial is not unlimited.

The difficulty is to ascertain just where the line is which distinguishes the powers that may be thus conferred from those which may not. The powers not judicial which have heretofore been conferred relate mainly, if not exclusively, to matters which are in their nature either local or exceptional, and which could not be con-

veniently or efficiently exercised directly by the legislative or by the executive.

It would be extremely difficult, if not impracticable, to establish each ferry, tavern and road which the public convenience might from time to time demand, and to fix the tolls to be charged at each ferry and the rates to be charged at each tavern, by the direct action of the legislature. The very nature of the case, and the great inconvenience, if not the utter impracticability, of exercising these functions of government without the aid of some local agency, no doubt led to the conferring of power over these subjects upon the county courts; and the argument from inconvenience, though never either safe or satisfactory in considering a question of constitutional law, may be urged in favor of what has now become a well-settled construction of the constitution as to those particular powers which have been conferred upon county courts continuously from the adoption of our first constitution.

But even the poor argument of *ab inconvenienti* cannot be urged in favor of the acts now under consideration. The labor and skill required and the compensation that ought to be made for sealing weights and measures are matters as well known to the members of the general assembly as to the members of a county levy court, and are the same in all parts of the state.

But if it were otherwise, it would by no means follow that, because we must, from deference to a long continued practice of the government, never, so far as we know, called in question, hold to be constitutional acts conferring upon county courts power to establish ferries, taverns, roads, and to regulate the charges of the proprietors of ferries and taverns, that we ought to hold that power may also be conferred upon these courts to prescribe the duties and fees of a public officer.

An officer is not entitled to compensation for official services rendered by him unless there is a law which specifically gives him a fee or salary. There is no implied promise on the part of those for whom he renders services to pay him for them. The legislature has not declared what fees the sealer of weights and measures for Jefferson county shall receive. That is a matter it has attempted to confide to the county courts. The court has by an entry upon its record prescribed his fees, and unless these orders have the force of law there is no law entitling the officer to compensation, or making it the duty of any one to pay him for sealing weights and measures.

To recognize them as laws would be to disregard the well-settled rule of American constitutional law, that legislative power cannot be delegated by the body in which the constitution has vested the legislative power of the state, and to ignore the very letter of our own constitution which declares that no person being of one department, shall exercise any power properly belonging to either of the others.

That these acts are unconstitutional was strongly intimated by the court in a manuscript opinion given in 1873, in the case of *Byrne v. Newman*. If they are valid then it would be difficult to imagine a reason why an act which should empower the several county courts in the state to prescribe the fees of all the public officers of their respective counties would not be equally valid.

Such an act would differ from those under consideration in degree but not in principle. An order prescribing the fees of one officer is neither more nor less an act of legislation than an order prescribing the fees of all the officers in the county. That the power to prescribe the fees of public officers is strictly a legislative power we presume no one will question.

The power to fix the fees of an officer to be paid by individuals to whom he may render services is a totally different thing from the power to fix the compensation to be paid by the county to the county judge and attorney and others, whether officers or private persons, who render services for the public at large.

The county court is the tribunal designated by law, and recognized by the constitution, as the fiscal agent of the county, and is an integral part of the government of the state. In making an allowance to county officers to be paid out of the funds of the county it acts ministerially in matters directly connected with the subject of its agency. As the agent or fiscal authority of the state or county it makes allowances to be paid out of the funds of the principal. It acts in obedience to the law which has placed the funds under its control, and directs the disposition to be made of it; and its only power is to decide how much of that fund shall be applied to a particular purpose.

But no such relation exists, and no duty is to be performed, in fixing the fees to be paid to a public officer by a citizen for whom the officer performs services. It is in no sense the agent of the citizen nor is it authorized to bind him to pay fees, the right to which can only be created by law, unless it has legislative power. As the legal-

ly established agency of the public it may be invested with power to bind the public by its action, but it has no power to create rights and duties as between a public officer and a private citizen by simply declaring by an order that if the officer shall perform certain services for the citizen he shall be entitled to demand certain fees as compensation for the services. This is purely a legislative power which cannot be constitutionally delegated to it.

We are therefore of the opinion that so much of the several acts of the general assembly, relating to the office of sealer of weights and measures for Jefferson county, as purports to vest in the county court of that county power to prescribe the fees of the incumbent of that office, is unconstitutional, and that the money paid him by the appellants as fees for sealing weights and measures, if paid under the circumstances stated in the petition, may be recovered back.

The judgment dismissing the petition is *reversed* and the cause remanded with directions to overrule the demurrer, and for further proceedings consistent with this opinion.

Harlan & Willson, for appellants.

B. F. Camp, John Roberts, for appellee.

ROBERT JONES *v.* COMMONWEALTH.

[Abstract Kentucky Law Reporter, Vol. 2—68.]

Criminal Law—Larceny.

Where the owner of personalty is induced to part with the possession of his property by the fraudulent practices and tricks of the defendant, who intends, at the time he gets the possession, feloniously to convert it to his own use, the defendant is guilty of larceny; but it is not larceny where the owner parts with the title of his property, although he may be cheated out of such title.

APPEAL FROM MARION CIRCUIT COURT.

December 18, 1880.

OPINION BY JUDGE HARGIS:

Where the owner parts with only the possession of property, which he is induced to do by the fraudulent practices of the defendant, who intends, at the time he obtains the possession, feloniously to convert the property to his own use, the defendant is guilty of larceny. It is true that where the owner parts with the

title to the property, although he may be cheated and defrauded out of the title by the person receiving it, the offense is not larceny.

In the case before us the testimony is that the accused approached Mr. Shadburn while he was sitting on the platform at the depot, and after entering into a conversation, asked him for change for a \$20 bill. Shadburn put his hand in his pocket and drew out a \$10 greenback and handed it to the accused and was proceeding to produce another when the accused ran off with the money. He pursued and caught the accused, but was compelled to let him go and take to flight himself by one Slaughter, who came up with a knife in his hand. The accused fled, and was afterward captured, tried and convicted of grand larceny.

From the judgment sentencing him to the penitentiary for the period of two years he prosecutes this appeal. His counsel contend that the title to the \$10 greenback passed to the accused and that the offense, if any, was not larceny. The \$10 greenback was parted with conditionally. The \$20 bill was to be delivered by the accused at the time that he received the \$10 greenback from Shadburn.

In *Reg. v. Cohen*, 5 Eng. L. & Eq. 545, the accused, bargaining with a trader for some waistcoats, said: "You must go to the lowest price, as it will be for ready money." The reply was: "Then you shall have them for 12 shillings," to which the accused assented and remarked that he would put them in his gig standing at the door. The trader replied, "Very well." He put them in the gig, drove off without paying for them, and was absent for two years. The jury found that the waistcoats were parted with conditionally, and that the owner only parted with the possession; and the judges held that he was rightly convicted of larceny.

The case of *Reg. v. Cohen* had more of the appearance of a purchase, and the possession was not violently obtained, as in the case before us. This case at least verges upon trespass. 2 Bishop on Crim. L. (7th ed.), Sec. 817, says: "Where one asked a boy in a shop to give him change for half a crown, presenting it to the boy, who touched it, but did not get hold of it; he was held, having received the change before he reached out the half-crown, to have committed larceny of the change." Many cases are cited in the note 4 to that section sustaining it. Where a person, not intending to part with his own money, pretends to wish to do so for the purpose of obtaining change, and thereby gets possession of and feloniously converts to his own use the money of another, he is guilty of larceny.

It follows from these views that there was no error in refusing to give instruction No. 4, asked by the counsel of the accused, as it contains the idea that if the delivery of the possession of the \$10 greenback was voluntary the title passed to the accused.

The indictment describes the money as "ten dollars of United States currency," serial number and on what bank unknown, and the evidence showed that it was a "\$10 greenback." We do not think there is any variance between the charge and evidence. Section 135, Criminal Code, provides that, "in an indictment for the larceny or embezzlement of money, or United States currency, or bank-notes, it is sufficient to allege the larceny or embezzlement of the same, without specifying the coin, number, denomination or kind thereof." This section was construed in *Jones v. Commonwealth*, 13 Bush 356.

The indictment does not give any other description of the money than ten dollars in United States currency; the rest of the indictment states what is unknown to the grand jury. There are no exceptions to the instructions given on motion of the commonwealth's attorney; hence they will not be considered.

Wherefore the judgment is *affirmed*.

J. D. Fogle, T. S. Edelin, for appellant.

P. W. Hardin, for appellee.

[Cited, *Müller v. Commonwealth*, 117 Ky. 80, 25 Ky. L. 1236, 1931, 77 S. W. 682, 79 S. W. 250.]

WILLIAM THRELKELD v. JOSEPH WINSTON.

[Abstract Kentucky Law Reporter, Vol. 2—63.]

Establishing Boundary by Parol Agreement.

A parol agreement establishing the boundary between distinct tracts of land may be enforced in a court of equity.

APPEAL FROM KENTON CHANCERY COURT.

December 18, 1880.

OPINION BY JUDGE PRYOR:

Whether the judgment below was entered by reason of the motion or the demurrer, or was upon the merits of the case, is involved in doubt; but taking the view presented by counsel for the appellant that it was by reason of the demurrer, the judgment should be reversed. That a parol agreement establishing the boundary between

distinct tracts of land may be enforced in a court of equity was decided by this court in *Jamison v. Petit*, 6 Bush 669, and the present petition not only seeks to establish the boundary as agreed upon, but adds other reasons why the chancellor would interpose, that is, to prevent continued and repeated trespass on the premises of the appellant by reason of the refusal of the appellee to abide by his agreement. We have examined the facts of this case also, and upon a consideration of the testimony this court is the more inclined to suppose that the case went off on the demurrer or motion, and not on the merits. There is nothing on the face of the petition showing the pendency of a similar action, and the case should have been considered below on its merits.

The judgment is therefore *reversed* and cause remanded.

This leaves the case open for additional testimony from either party.

McKee & Finnell, for appellant.

Simmons & Schmidt, Benton & Benton, for appellee.

[Cited, *Campbell v. Campbell*, 23 Ky. L. 869, 64 S. W. 458.]

SAMUEL SMITH, ET AL., v. THOMAS R. HUTCHCRAFT'S TRUSTEE.

[Abstract Kentucky Law Reporter, Vol. 2—65.]

Title by Purchase at Judicial Sale.

Setting aside a conveyance of real estate on the application of creditors does not affect the rights of the parties to the conveyance, and they hold subject to the claims of creditors, as if no such judgment had been rendered.

APPEAL FROM SCOTT CIRCUIT COURT.

December 18, 1880.

OPINION BY JUDGE PRYOR:

The only objection urged to the title of the land purchased by the appellant necessary to be considered arises from a construction of the conveyance made by Hutchcraft to Mrs. Rogers. The setting aside of that conveyance on the application of creditors did not affect the rights of the parties to that instrument, and they hold subject to the claims of creditors, as if no such judgment had been rendered. The grantor, Hutchcraft, it seems, had no family except a wife at the date of the conveyance to Mrs. Rogers; or if married

since, there was no one constituting his family then or since whom he was under any legal obligation to maintain except the wife. The word "family" used in the conveyance cannot well be applied to any other person, if any meaning is to be attached to the word as used in the conveyance. It is certain that if all those constituting his family united in the deed at the time it was executed, that is, the deed from Robert Hutchcraft and others to the appellant, it passed to him a perfect title, unless other defects exist not apparent on this record.

He had no children either at the date of the creation of the trust or when the deed was made to appellant; and the title being out of him by that conveyance, if he should have children they could not defeat the right of the purchaser. The original conveyance also provides that at the death of the grantor, Hutchcraft, the trust shall terminate and the estate pass to the heirs of the grantee. The heirs acquired no right by reason of the conveyance, but the estate, if undisposed of, would pass to them by inheritance, the effect of the deed being to terminate the entire trust at the death of the grantor and the estate to pass as if no conveyance had been made. The parties undertook to make to the appellant a good title, and the assignee and trustees having united in the conveyance, and Hutchcraft making a general warranty deed, the appellant was properly required to accept the conveyance. The covenant by Hutchcraft that he will warrant generally the title embraces all the land sold, and not merely Hutchcraft's interest.

The judgment below is therefore *affirmed*.

George E. Prewitz, for appellant. W. S. Darnaby, for appellee.

R. E. SANDIFER *v.* BENJAMIN A. HARDIN.

[Abstract Kentucky Law Reporter, Vol. 2—65.]

Conveyance by Husband and Wife.

A deed of a married woman is void where her husband does not join therein, and he has not theretofore conveyed, and the subsequent deed of the husband does not convey the wife's interest.

APPEAL FROM McLEAN CIRCUIT COURT.

December 18, 1880.

OPINION BY JUDGE HINES:

The deed of Mary Hardin to B. A. Hardin was absolutely void because the husband did not join in the conveyance, and he had not heretofore conveyed. The subsequent deed of the husband, W. J. Hardin, to B. A. Hardin conveyed no interest of the wife, Mary Hardin. Her deed to B. A. Hardin being void, whatever title or interest she had is still in her, and so far as we can gather from the pleadings the fee was and remains in Mary Hardin. On the filing of the answer denying title and pointing out the specific defect the proper course was for plaintiff to have replied and tendered them with the missing link in his chain of title.

Judgment *reversed* and cause remanded with directions for further proceedings.

L. W. Gates, W. P. D. Bush, for appellant.

[Cited, *Furnish's Adm'r v. Lilly*, 27 Ky. L. 226, 84 S. W. 734.]

SAM RENAN v. COMMONWEALTH.

JAMES HARGROVE v. COMMONWEALTH.

[Abstract Kentucky Law Reporter, Vol. 2—66.]

Criminal Law—Perjury.

Where it is not made to appear that the alleged false testimony was material the crime of perjury is not made out.

Materiality of Perjured Testimony.

Whether certain testimony is material, when one is charged with perjury in swearing to it, is a question of law and ought to be decided by the court. In such a case it is for the jury to decide what the testimony of the defendant was and whether it was wilfully and corruptly false; but the court should decide whether it was material.

APPEALS FROM HICKMAN CIRCUIT COURT.

December 18, 1880.

OPINION BY JUDGE COFER:

It does not seem to us that the testimony of the appellants is shown by the record to have been material. The action of Brock v. Avery was on this account:

"William Avery,

To P. C. Brock, Dr.

To transporting two persons, in May, across the river
from Columbus to the Missouri shore, \$16.00.....\$32.00"

The alleged false testimony of the appellants on the trial of that case was, in substance, that Avery transported two or three persons across the river and received pay for it. Just how this could be material the record does not show. The account upon its face imports that Brock had transported two persons across the river, and that Avery was indebted to him for it. The record furnishes no explanation as to how Avery could become debtor to Brock on account that Avery had transported persons across the river.

Evidence in such a case that the defendant had in his own skiff carried persons across the river did not tend, as far as we can discover in this record, to prove or to disprove Brock's claim in that suit. It is probable that Brock is the owner of an established ferry across the river, and that the action was based on Sec. 19, Chap. 42, General Statutes, giving to the owner of a ferry an action against any one who shall, for reward, transport any person across a water course within one mile of an established ferry. But this does not appear in the record, and, without it, it does not appear that the alleged false testimony was material; and unless it was material, of course the crime of perjury was not made out.

The evidence conduced to prove that the appellants gave the testimony alleged in the indictments against them respectively; but the court seems to have excluded from the jury in the case against Hargrove all the evidence except so much thereof as proved the oath as to his following Avery across the river, and testimony conducing to prove the falsity of that statement.

If the testimony of Renan was material, then the testimony of Hargrove as to his following Avery was material because it tended to corroborate the testimony of Renan in the statement that they followed Avery across the river. But the court should not have left it to the jury to say whether the action was within the jurisdiction of the justice, or whether the testimony of the appellants was material. These are questions of law and ought to have been decided by the court. It is for the jury to decide what the testimony of the appellants was, and whether it was wilfully and corruptly false; but the court should decide whether it was material. This opinion applies to both cases.

Judgment *reversed* and cause remanded for new trials.

Bullock & Bullock, for appellants. P. W. Hardin, for appellee.

JOHN RASKE, JR., *v.* COMMONWEALTH.**Criminal Law—Murder.**

Where one being present engaged in the strife that results in the death of a party, although he has the right to interfere to preserve the peace and to protect his relative from the assault of the deceased, he has no right to use more force than is reasonably necessary for that purpose.

Separate Trial—Election by the State.

Where two persons are jointly indicted, and one asks for a separate trial, the commonwealth has the right to select which of the two shall be first tried.

APPEAL FROM GREENUP CRIMINAL COURT.

December 21, 1880.

OPINION BY JUDGE PRYOR:

It is shown in this case that the accused was present, and engaged in the strife that resulted in the death of Fowler; and while he had the right to interfere to preserve the peace and to protect his relative from the assault of Fowler, he had no right to use more force than was necessary for that purpose. In the instructions given we think the law was properly presented to the jury, and certainly no instruction that can be regarded as prejudicial to the rights of appellant.

In instruction No. 3 the law of manslaughter is properly defined; and in instruction No. 4 the jury were authorized to fix the punishment at fine and imprisonment, and of this the commonwealth might have complained and not the accused.

Instruction No. 5 went fully as far as the facts of this case authorized the court to go in determining what means the accused had the right to adopt, in order to preserve the peace and to prevent the infliction of great bodily harm on William Raske by the deceased. We see nothing in the evidence permitted to go to the jury, or any that was refused, prejudicial to the accused. The fact of the killing is clearly established by a preponderance of the testimony, and the right of the accused to an acquittal depended upon the facts occurring at the time, although evidence of what was said by old man Raske to the witness may have been improper to go to the jury; still it is shown that the witness himself made the proposition to accept the bribe, and in our opinion the jury could have attached no

importance to it. It was not error to instruct in regard to murder, as the evidence authorized the submission of such an issue to the jury. As a separate trial was demanded the commonwealth had the right to select which of the two should be first tried. The whole law of the case was embodied in the instructions given, and the substantial rights of the accused have not been prejudiced.

Judgment *affirmed*.

E. F. Dulin, Roe & Roe, L. T. Moore, for appellant.

Moss, for appellee.

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